Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

USX CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether section 302 of the Labor Management Relations Act (29 U.S.C. § 186) prohibits an employer from granting a former employee, who left to become a full-time union official, an indefinite leave of absence that allows that former employee to earn credits toward pension eligibility.

B. Whether section 302(d)(2), which makes it a felony to violate section 302 "willfully," requires proof that the defendant acted with specific intent to do something the law forbids.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, two individual defendants, Thermon Phillips and E.B. Rich, were appellants below. They will be filing a separate petition for a writ of certiorari.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Petitioner, USX Corporation, formerly known as United States Steel Corporation, is a publicly owned corporation with three classes of common stock: USX-Marathon Group, USX-U.S. Steel Group, and USX-Delhi Group.

Non-wholly owned subsidiaries of petitioner USX Corporation are as follows: CLAM Petroleum Company, Double Eagle Steel Coating Company, Laredo-Nueces Pipeline Company, National-Oilwell, PRO-TEC Coating Company, USS/Kobe Steel Company, USS-POSCO Industries, Worthington Speciality Processing, Transtar, Inc., LOCAP INC., LOOP, INC., Kenai LNG Corporation, Ozark Gas Transmission System, and RMI Titanium Company.

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REFERENCE TO OPINIONS BELOW

There is no relevant opinion of the district court. The opinion of the court of appeals in this matter is reported at 19 F.3d 1565. A copy of that opinion is included in the appendix to this petition. App. 1a-40a.

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals was entered on May 10, 1994. App. 1a-40a. A timely petition for rehearing was denied by that court on August 9, 1994. App. 41a-42a. This Court's jurisdiction to review the judgment below is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AT ISSUE

The full text of section 302 of the Labor Management Relations Act (29 U.S.C. § 186) is reproduced in the appendix to this petition. App. 43a-49a.

STATEMENT OF THE CASE

This petition raises two important, interlocking questions concerning the proper interpretation of section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186. As the court of appeals itself acknowledged below, one of the questions has divided the circuits into "majority" and "minority" camps. See App. 27a, 34a. The other question, equally vexing to the courts of appeals, has arisen in enough cases and generated enough disparate precedent to warrant, independently, this Court's attention as well.

A. Proceedings Below.

This petition arises out of a criminal prosecution conducted in the United States District Court for the Northern District of Alabama. That court had jurisdiction over this proceeding pursuant to 18 U.S.C. § 3231.

On November 15, 1989, a Grand Jury sitting in the Northern District of Alabama returned a 16-count indictment against petitioner USX Corporation ("USX" or "the Company") and two representatives of District 36 of the United Steelworkers of America, E.B. Rich and Thermon Phillips. Count One of the indictment charged all three defendants with conspiring to violate section 302 of the LMRA [1] by granting Rich and Phillips "leaves of absence" that allowed them to earn credit toward a pension from USX. Count Two charged Rich, and Count Three charged Phillips, with felony violations of that section for accepting those leaves of absence as an alleged *quid pro quo* for concessions made to USX during the negotiation and implementation of a labor agreement. Counts Four and Five charged USX with felony violations of section 302. Counts Six through Fifteen charged USX, Rich, and Phillips with violations of the mail fraud

[1] Section 302 of the LMRA is codified at 29 U.S.C. § 186, and is therefore sometimes referred to as "section 186." While the court below used this latter designation, this petition will use the former.

statute, 18 U.S.C. § 1341. Count Sixteen charged USX with a criminal violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1131.

Trial against USX, Rich, and Phillips began on March 5, 1990. On May 21, 1990, the district court granted the government's motion to dismiss the mail fraud counts against Phillips. Also on that date, the district court, over the defendants' objection, amended Counts Two through Five of the indictment—the substantive felony charges under section 302 of the LMRA—to eliminate the grand jury's specification that the benefits USX conferred upon Rich and Phillips had been granted as a *quid pro quo* for certain actions those individual defendants had taken.

On July 10, 1990, after nine days of deliberation, the jury returned a verdict of guilty against all defendants on Count One, the conspiracy charge. The jury also returned guilty verdicts against the defendants on the substantive LMRA counts—Count Two (Rich), Count Three (Phillips), and Counts Four and Five (USX). The jury acquitted Rich on all mail fraud counts, but found USX guilty on those counts. USX was also found guilty on Count Sixteen, the ERISA charge.

At sentencing, the district court imposed upon USX consecutive fines of $500,000 each on Counts 1, 4, 5, 7, 9, 11, 13, and 15, consecutive fines of $1,000 each on Counts 6, 8, 10, 12, and 14, and a consecutive fine of $100,000 on Count 16, for a total fine of $4,105,000. It also ordered USX to make restitution to the United States Steel and Carnegie Pension Fund in the amount of $289,995.88. Rich and Phillips were sentenced to terms of 36 months' imprisonment and 30 months' imprisonment, respectively. Each individual was also fined $6,000. All sentences have been stayed pending completion of appeals.

B. Statement of Facts.

This prosecution arose out of a decision by petitioner USX to revise its leave-of-absence policy to permit leaves of absence of unlimited duration to a defined class of former USX employees who had left the employ of USX to become full-time representatives of the United Steelworkers of America. Those leaves of absence allowed certain union representatives who had been employed by USX to receive continuous service credit toward USX's pensions for the period during which they were employed by the Union. According to the theory successfully advanced by the government in the court below, this change in policy regarding leaves of absence constituted a criminal violation of the LMRA regardless of USX's purpose in changing its policy and regardless of the parties' knowledge or belief as to the supposed illegality of their actions.

The events at the center of this prosecution had their inception during negotiations between USX and the Union in late 1983, which were undertaken in an attempt to reopen the Company's then-idled Fairfield Works outside Birmingham, Alabama. In June 1982, USX had indefinitely idled the Fairfield Works and had laid off its 3,500 employees.

In the fall of 1983, representatives of USX negotiated with Rich and Phillips, as representatives of the Union, in an attempt to save the plant from permanent shutdown. At that time, USX informed the Union that it would close the plant permanently unless the Union agreed to concessions that would make Fairfield economically viable. On December 24, 1993, after four months of negotiations, an agreement was reached that resulted in the reopening of the facility.

Ten months after signing this agreement, USX's Corporate Policy Committee adopted a proposal to amend its policy regarding leaves of absence to allow certain categories of former employees who had left USX to work full-time for the Union to extend their leaves of absence

retroactively and thereby qualify for pensions from USX. While USX believed that this change in policy applied to at least six particular Union officials at Fairfield, including Rich and Phillips, and therefore authorized pensions for those individuals, in fact Rich was the only one of the six who actually qualified under all the amendment's terms.

In its original indictment, the Grand Jury alleged that USX had granted Rich and Phillips their leaves of absence as a *quid pro quo* for concessions to USX. More specifically, in each of Counts Two through Five of the indictment, the Grand Jury alleged that the leaves of absence were, "as [USX] well knew and believed, paid and delivered [by USX] to reward [Rich and Phillips] for having approved the December 24, 1983, Fairfield Works Agreement and for being cooperative in its implementation and interpretation . . . ." R1-1-13-16. Each of the counts brought under the LMRA also charged, in conformity with the statute itself, that the defendants acted "willfully" in violating the terms of that statute.

At trial, the government argued that the defendants could be convicted of violating the LMRA regardless of whether the leaves of absence were granted as a *quid pro quo* for any action on the part of Rich and Phillips, and regardless of the parties' understanding or belief as to the legality of the leaves of absence. The district court accepted this argument and took two steps that profoundly altered the nature of this prosecution. First, it deleted the *quid pro quo* language from Counts Two through Five of the indictment as "surplusage." Second, it instructed the jury that the defendants could be convicted under Counts Two through Five regardless of their understanding as to the legality of the leaves of absence: "[T]he government is not required to prove that the pension payments were made by or for USX Corporation or received by the individual defendants with an evil or bad purpose or with the intent to violate the law or with

knowledge that the law would be or was violated." R41-9686.

In addition to these rulings on the intent required by the LMRA, the district court considered whether the leaves of absence qualified for an exception to the LMRA's proscriptions for payments made by an employer to "an employee or former employee . . . , as compensation for, or by reason of, his service as an employee of such employer[.]" 29 U.S.C. § 186(c)(1). According to the district court, the (c)(1) exception "refers only to payments by an employer to former employees for services actually rendered by those former employees while they were employees of the employer-company." R41-9685. This instruction conclusively precluded application of the (c)(1) exception to the leaves of absence at issue in this prosecution.

The result of these three rulings—that no proof of a *quid pro quo* was necessary, that no knowledge of illegality was necessary, and that the (c)(1) exception did not apply to these leaves of absence—was profound, indeed dispositive. During its closing argument, the government was able to argue to the jury that conviction on Counts Two through Five was required so long as "the defendants were awake . . . [and] it wasn't computer error." R41-9576.

The court of appeals affirmed the convictions in all respects. On the applicability of the (c)(1) exception, it concurred with the district court's ruling, although for reasons different from those stated by the district court. Indeed, in announcing its decision on this issue, it formulated a novel test for application of the (c)(1) exception, a test hinging entirely upon whether the benefit was conferred prospectively or retroactively.

The court of appeals also affirmed the district court's ruling as to the meaning of the term "willfully" in the

LMRA. In doing so, the appellate panel acknowledged a split in the circuits on this issue, with decisions in the Second, Third, Sixth, and Ninth Circuits constituting a "majority" rule and decisions in the Seventh Circuit and perhaps the Tenth Circuit constituting a "minority" rule. App. 27a, 34a & nn.21, 27.

REASONS FOR GRANTING THE PETITION

The court of appeals decided two interlocking, important issues in the field of labor relations. First, it ignored several precedents in other circuits and formulated a novel test for determining whether leaves of absence granted to full-time union officials formerly employed by a company are permissible under the (c)(1) exception to section 302 of the LMRA. Second, the court below elected to align itself with a "majority" of circuits that would permit felony conviction of defendants for violating the LMRA even though those defendants had no reason to believe that their conduct was illegal, despite a statutory requirement that such violations must be committed "willfully." The court acknowledged that the circuits with which it chose to align itself were in conflict with others, which it characterized as the "minority." App. 27a, 34a & n.27.

These rulings, in tandem, will subject companies and union officials alike to criminal sanctions for failing to predict the application of a complex statute to even more complex circumstances that arise frequently in labor relations. Perhaps more importantly, they will impose upon companies and unions that do business in more than one circuit an intolerable conflict of laws governing what labor arrangements violate section 302 and what circumstances will subject them to criminal prosecution.[2]

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[2] Both of these issues warrant review by this Court. Solely for ease of exposition, this petition addresses the meaning of "willfulness" under section 302(d)(2)—an issue as to which there is an acknowledged circuit split—after discussing the (c)(1) exception to section 302.

1. In its opinion below, the court of appeals first confronted an issue that has confounded courts, employers, and unions for at least eight years: the circumstances under which an employer may allow former employees who go to work for a union full-time to continue to accrue credit toward their company-sponsored pensions. Quite obviously, this is a question of great import to labor-management relations.

As the court below observed, section 302(a), on its face, prohibits employers in industries affecting commerce from giving anything of value to representatives of their employees or to union officials.[3] See App. 18a-19a. Subsection (c)(1) of the provision states, however, that the prohibition found in subsection (a) does not apply to benefits given by an employer to a union official "who is also an employee *or former employee* of such employer, as compensation for, or *by reason of*, his service as an employee of such employer . . . ." 29 U.S.C. § 186(c)(1) (emphasis added).[4]

Prior to USX's decision to amend its leave-of-absence policy in 1984, employers and unions alike interpreted the (c)(1) exception as allowing an employer to give pension credit to former employees who went to work full-time for the union representing the company's employees. Such benefits encourage employees to serve their

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[3] Section 302(a) reads, in relevant part, "It shall be unlawful for any employer . . . to pay, lend, or deliver . . . any money or other thing of value . . . to any representative of any of his employees who are employed in an industry affecting commerce[.]" 29 U.S.C. § 186(a)(1). The full text of section 302 appears at App. 43a-49a.

[4] Section 302(c)(1) reads, in relevant part, "The provisions of this section shall not be applicable . . . in respect to any money or other thing of value payable by an employer . . . to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer[.]" The full text of section 302 appears at App. 43a-49a.

union without fearing a loss of pension eligibility and thus provide benefits to both unions and employers.

For example, in a 1980 report published by the Department of Labor and proffered by defendants at trial, the Bureau of Labor Statistics observed that numerous companies allowed for leaves of absence for company employees who became full-time union officials. According to the Report, it was quite common for union representatives on such leaves of absence to continue to accrue company benefits like pensions. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Collective Bargaining Agreements: Employer Pay and Leave for Union Business* 25-27 (1980).

Moreover, at trial and in its brief to the appellate court in this case, the government was forced to admit "that granting leaves of absence to union officials was indeed a common practice." Brief of the United States at 75. According to the government, such arrangements were not always embodied in collective bargaining agreements, nor were they always in place at the time the employee left the company's employ to work for the union: "No less than 21 witnesses testified that particular companies gave extended leaves of absences, sometimes retroactively and sometimes by side letter agreements." *Id.* at 93.

Beginning in 1986, a year and a half after USX authorized the leaves of absence in this case, the legality of such practices fell into a state of uncertainty that has persisted and has actually worsened up through the present time. A series of decisions beginning with *Trailways Lines, Inc.* v. *Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986), and culminating with the decision below, has left employers and unions alike wholly uncertain as to how to identify a legitimate effort to protect pension eligibility for former employees and how

to distinguish such an effort from an illegal bribe under section 302 of the LMRA.

In *Trailways,* a panel majority of the United States Court of Appeals for the Third Circuit considered the legality of a provision in a collective bargaining agreement that granted employees leaves of absence to work full-time for a union while still accumulating pension credits with the company. According to the majority decision, such an arrangement violated the LMRA and did not qualify for the (c)(1) exception. The court rejected the union's argument that such a leave-of-absence arrangement qualified for the exception because it was offered "by reason of" the former employee's service to Trailways. Instead, the court held that subsection (c)(1) permitted payment of benefits to former employees only "for past services actually rendered by those former employees *while they were employees of the company.*" *Id.* at 106 (emphasis in original).

Judge Becker dissented, arguing that the benefits conferred upon the former employees logically were "compensation for services rendered to Trailways prior to the commencement of the leaves of absence." *Id.* at 109. He found particularly important in this regard the frequency with which companies and unions had entered into these arrangements in the past:

> Consideration of the widespread business practices of companies and unions provides further reason to believe that the pension contributions at issue here are not illegal . . . . This Court should be reluctant to overturn so widespread a practice, which represents a practical accommodation agreed upon by both businesses and unions.

Id. at 111.

Trailways was, in short, a categorical rejection of any effort to extend pension credits to employees who left the service of their employer to work full-time for their

union. What mattered to the *Trailways* majority was that the credits were being earned while the beneficiary was employed by the union rather than by the company.

This relatively clear, if draconian, rejection of leaves of absence was, however, quickly repudiated in other jurisdictions. In *Communications Workers of America* v. *Bell Atlantic Network Services, Inc.*, 670 F. Supp. 416 (D.D.C. 1987), the district court considered another arrangement under which employees of Bell Atlantic could take leaves of absence to work for their union while continuing to accrue pension credits from the company. While noting several possible factual distinctions between the leaves of absence considered in *Trailways* and the leaves of absence offered by Bell Atlantic, the district court ultimately found the reasoning of the *Trailways* majority "not persuasive" and endorsed Judge Becker's analysis of the statute. 670 F. Supp. at 423. As a result, Bell Atlantic's leaves of absence were found to be permissible.

Two years later, the Seventh Circuit considered the legality of the precise leaves of absence offered by USX in this case.[5] In *Toth* v. *USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989), the court, like the court in *Bell Atlantic*, found the *Trailways* analysis of section 302(c)(1) unpersuasive: "We cannot find any signal in the text itself, nor in the legislative history of the text, to justify the Third Circuit's restrictive reading of the language of section 302(c)(1)." 883 F.2d at 1303. The court went on, however, to hold that USX's leaves of absence could not qualify for the (c)(1) excep-

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[5] In the wake of the *Trailways* decision in 1986, USX had rescinded the policy regarding leaves of absence it had adopted in 1984. A group of former employees, including plaintiff Andrew Toth, then brought a civil action in the United States District Court for the Northern District of Illinois to enforce the abandoned policy. The district court denied their request; an appeal was taken to the Seventh Circuit.

tion because those benefits were "not a part of [a] bargained-for collective bargaining agreement." *Id.* at 1305.

The *Toth* court made no attempt to ground this distinction in the language of subsection (c)(1). Instead, it offered a series of arguments purporting to establish that leaves of absence negotiated as part of collective bargaining agreements would not implicate the policies underlying the prohibition in section 302(a). This, according to the court in *Toth*, was enough to place USX's policy outside the protection of subsection (c)(1). See *id.* at 1304-06.

Trailways, *Bell Atlantic*, and *Toth*, for all their analytical dissimilarity, do share one important feature: they were all civil actions in which each court could and did exercise some interpretational license to fulfill what it saw as the policies underlying section 302. In this case, however, the courts below confronted the meaning of subsection (c)(1) in the context of a criminal prosecution, a context in which statutory ambiguities should have been resolved strictly in favor of the defendants. See, *e.g.*, *Hughey* v. *United States*, 495 U.S. 411, 422 (1990).

Confronted with this challenge, the panel below ignored entirely both *Trailways* and *Bell Atlantic* and rewrote the holding in *Toth* as if that earlier decision had turned on the retroactivity of USX's policy rather than upon its promulgation outside a collective bargaining agreement. App. 22a.[6] According to the panel, subsection (c)(1) "does not apply when a company pays a union official who was a former employee, but who did not have a right to such payment before he severed his employment relationship with the company." *Id.* Following the lead of its counterparts in the earlier, civil cases, the panel below purported to consider the perceived policies underlying section 302(a): "When an employee's right

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[6] In fact, *Toth* had expressly left "to another day the question whether retroactive bargaining is permissible." *Toth* v. *USX Corp.*, 833 F.2d 1297, 1306 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989).

to a benefit has fully vested before the leave of absence begins, there is no danger of corruption when the employer delivers the benefit after that employee leaves the company to work for the union[.]" *Id.*

As a result, employers and unions now confront four different regional tests for determining the legality of leaves of absence under subsection (c)(1). If the arrangement exists in Delaware, New Jersey, Pennsylvania, or the Virgin Islands, it is categorically proscribed by *Trailways*. If the arrangement exists in the District of Columbia, it would appear to be permissible under *Bell Atlantic*. If the arrangement exists in Illinois, Indiana, or Wisconsin, it is permissible under *Toth* if, but only if, it is embodied in a collective bargaining agreement. If it exists in Alabama, Florida, or Georgia, it is legal only if it is not retroactive.

Of all these "tests," only the one announced in *Bell Atlantic* (which follows the analysis of Judge Becker in his *Trailways* dissent) is grounded in the plain language of subsection (c)(1). None of them, of course, had been announced in 1984 when USX adopted the policies at issue here.

In all likelihood, the issues presented in this petition would have been avoided if the government had not been permitted to amend the indictment to remove from Counts Two through Five the Grand Jury's allegation that the benefits conferred in this case were a *quid pro quo* for concessions by the union officials. By pressing at trial for convictions if "the defendants were awake" rather than seeking a conviction for outright bribery as first alleged, the government created an issue that otherwise would not have been controversial.

On the other hand, if the government had concluded its investigation with the same reading of section 302 it presented to the jury at trial, USX would not, in all likelihood, have even been indicted for violating section 302. When asked by the district court why the "intent to influence" language had been included in the indictment in

the first place, the prosecutor responded, "Judge, that's a long story. And I didn't want to do it, but some other lawyers in Washington said I should. And I didn't think I should, but they prevailed on me." R19a-10.

The importance of this issue to employers and unions and the need for nationwide uniformity on this point warrant review by this Court.

2. Having held, for the first time, that any attempt to grant leaves of absence retroactively violates the LMRA, the court below compounded the risks faced by employers and unions considering such programs by holding that felony sanctions attend every violation of section 302(a), whether or not the participants knew they were transgressing the law. This holding, by itself, places the Eleventh Circuit in an acknowledged conflict with other circuits, particularly the Seventh, and warrants review by this Court on this basis alone.

A central issue throughout the four-month trial in this case was USX's understanding and belief as to the legality of its actions. Prior to USX's amendment of its leave-of-absence policy in 1984, no court had held that such leaves of absence violated the LMRA. To the contrary, as described earlier, the prevalence of such programs and their recognition by such authorities as the Department of Labor offered strong indications that they were permissible.

At about the same time that USX was weighing an amendment to its leave-of-absence policy, Congress was considering certain amendments to the LMRA. Prior to 1984, the criminal enforcement provision of that statute was set forth in section 302(d), which read, "Any person who willfully violates any of the provisions of section 302 shall . . . be guilty of a misdemeanor." App. 30a. In 1984, Congress amended that subsection to include subsection 302(d)(2): "any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000,

or imprisoned for not more than five years, or both . . . ." 29 U.S.C. § 186(d)(2).

During the time when a criminal violation of section 302 constituted a misdemeanor, several courts of appeals held that, despite the inclusion of the term "willfully" in subsection 302(d), the misdemeanor statute did not require proof that the defendant acted with specific intent to do something the law forbids, or with bad purpose either to disobey or disregard the law. Instead, according to those early decisions, section 302(d) required only proof of "general intent." See *United States* v. *Cody*, 722 F.2d 1052, 1059 (2d Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *United States* v. *Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982); *United States* v. *Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States* v. *Carter*, 311 F.2d 934, 943 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963).[7] But see *Korholz* v. *United States*, 269 F.2d 897 (10th Cir. 1959), *cert. denied*, 361 U.S. 929 (1960) (apparently to the contrary but discounted by the court below, App. 35a n.27, as "too cryptic . . . to draw a conclusion about whether a general intent instruction would have been upheld").

At trial in this case, defendants urged the district court to instruct the jury on Counts Two through Five in conformity with the meaning of "willfully" set forth in the Pattern Jury Instructions promulgated by the Eleventh Circuit District Judges Association. According to those pattern instructions, "willfully" means that "the act was committed voluntarily and purposely, with the specific

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[7] In the courts below, defendants argued that these pre-amendment decisions were based upon an erroneous reading of certain dicta offered by this Court in *United States* v. *Ryan*, 350 U.S. 299, 305 (1956) ("as [section 302] reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative"). The appellate panel below did not reach this argument because it found the reasoning for those pre-amendment cases "not relevant" to its own analysis. App. 28a.

intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law." Eleventh Circuit District Judges Ass'n, *Pattern Jury Instructions—Criminal Cases* § 9.1, at 22 (1985). In further support of this instruction, defendants observed that, in 1984, Congress had increased the severity of the underlying offense from a misdemeanor to a felony and that the highly technical nature of section 302 rendered such an instruction particularly appropriate. The district court refused, however, to depart from the rule stated in the pre-amendment cases, even though it described that rule as "idiotic," "amazing[]," and "highly unusual." R29-3767, R35-6550-51.

On August 10, 1990, exactly one month after the jury returned its verdict in this case, the Seventh Circuit became the first appellate court to consider the meaning of the term "willfully" in section 302 after the 1984 amendment to that section. That court concluded, in accord with the position previously advanced by defendants, that a conviction under section 302 requires "an awareness of or reckless disregard for [section 302's] restrictions[.]" *United States* v. *Papia*, 910 F.2d 1357, 1362 (7th Cir. 1990).

The appellate panel in this case acknowledged the division between the older decisions in the Second, Third, Sixth, and Ninth Circuits on the one hand, and the more recent decision in the Seventh Circuit on the other hand. App. 27a, 34a. In electing to align itself with what it labeled the "majority" view, however, the panel eschewed any reliance whatsoever upon the actual analysis employed by the supposed majority. App. 28a. Instead, it embarked upon its own review of the structure of section 302 and the legislative history of the 1984 amendments. App. 29a-35a.

In the end, the panel's analysis is self-defeating. While its opinion went to great lengths to demonstrate that the interpretation of section 302(d)(2) offered by *Papia*

and embraced by defendants would supposedly render certain other portions of the statute superfluous, it neglected to note that its own reading of section 302(d)(2) would render the term "willfully" itself superfluous. As this Court recently pointed out in *Staples* v. *United States*, 114 S. Ct. 1793, 1797 (1994), all felonies are presumed to require a finding of at least "general intent," even if Congress included no such requirement in the statutory language. See also *id.* at 1804 ("where . . . dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement"). Thus, had Congress intended to allow defendants like USX to be convicted of felonies for violating the LMRA so long as they were "awake . . . [and] it wasn't a computer error[,]" R41-9576, it would have omitted the term "willfully" from section 302(d)(2) entirely.

As it was aligning itself with the wrong side of an acknowledged split in the circuits, the court below ignored the very recent precedent of this Court outlining the appropriate analysis in cases like this one. In *Ratzlaf* v. *United States*, 114 S. Ct. 655 (1994), this Court considered the meaning of the term "willfully" in a statute outlawing the structuring of transactions to avoid currency reporting laws. In deciding that the statute required proof that the defendant knew of the illegality of his conduct, the Court reasoned:

> Congress subjected to criminal penalties only those "willfully violating" [the act], signaling its intent to require for conviction proof that the defendant knew not only of the bank's duty to report cash transactions in excess of $10,000, but also of his duty not to avoid triggering such a report. There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear. Moreover were we to find [the statute's] "willfulness" re-

> quirement ambiguous as applied to [the act], we would resolve any doubt in favor of the defendant [under the "rule of lenity"].

114 S. Ct. at 662-63 (internal citations and footnotes omitted). See also *Cheek* v. *United States*, 498 U.S. 192 (1991) ("willfully" as used in the tax code precludes conviction of defendants who hold honest, even if mistaken, beliefs that their conduct is lawful).

Here, the court of appeals not only resorted to legislative history "to cloud a statutory text that is clear," but completely ignored the rule of lenity that would have aligned it with the Seventh Circuit's decision in *Papia* rather than the pre-1984 cases that made up the so-called "majority." But no matter how wrong the court was in evaluating the "majority" and "minority" views, the fact remains that there is a conflict—and an acknowledged one at that—on this issue. That division of authority warrants review by this Court.

Moreover, the importance of this issue can hardly be overstated, particularly when the lower court's holding is viewed in tandem with the kaleidoscopic interpretations of the (c)(1) exception now prevailing around the country. If the decision below is left uncorrected, any failure to anticipate the vagaries of the (c)(1) exception could subject the "perpetrator" to felony sanctions.

* * * *

The intolerability of the status quo is revealed by contrasting the current states of affairs in various jurisdictions. Under *Toth*, employers in the Seventh Circuit may grant their employees leaves of absence to work for a union so long as those benefits are embodied in a collective bargaining agreement. Even if they are not, under *Papia*, criminal sanctions will not be imposed unless the actors knew or had reason to know they were behaving illegally.

By contrast, in the Eleventh Circuit, under the decision below, employers may not grant such leaves of absence

if they are made retroactive. If that error is made, felony prosecution could result even in the absence of any awareness of illegality.

In the District of Columbia, under *Bell Atlantic*, leaves of absence are plainly legal in some circumstances, while the level of intent required to commit a felony remains undetermined.

In the Third Circuit, under *Trailways*, any leave-of-absence arrangement would appear to be illegal, no matter whether it is prospective or retrospective and regardless of whether it is enacted as part of a collective bargaining agreement. Under *United States* v. *Pecora*, 484 F.2d 1289 (3d Cir. 1973), a pre-1984 case, the offering of any leave-of-absence program (even one permissible in the Seventh Circuit, the Eleventh Circuit, or the District of Columbia) could result in prosecution for a felony regardless of the defendant's belief as to the legality of the arrangement.

This patchwork of rights and risks on a matter of fundamental and recurring importance in labor-management relations clearly cannot be allowed to continue. The interests at stake—including felony liability—are too important to be pinned on the fortuity of the particular part of the country in which one happens to live or transact business. This Court should therefore grant a writ of certiorari to resolve these important issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-7721

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THERMON PHILLIPS, E.B. RICH, USX CORPORATION
a/k/a UNITED STATES STEEL CORPORATION,
Defendants-Appellants.

Appeal from the United States District Court
Northern District of Alabama

May 10, 1994

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and FAY, Senior Circuit Judge.

TJOFLAT, Chief Judge:

This case involves a steel producer's payment of kickbacks, in the form of illegal pension payments, to union officials, in violation of the Labor Management Relations ("Taft-Hartley") Act § 302, 29 U.S.C. § 186 (1988), and its failure to notify the employee pension plan's participants that the plan had been amended to provide for such payments, as required by the Employee Retirement Income Security Act ("ERISA") §§ 101, 102,

104, 29 U.S.C. §§ 1021, 1022, 1024 (1988). A jury found that the steel producer and the union officials, by arranging for the pension payments, violated the Taft-Hartley Act, and it convicted them under the Act's criminal enforcement provisions, 29 U.S.C. § 186(d). In addition, the jury found the steel producer guilty under ERISA's criminal enforcement provision, 29 U.S.C. § 1131 (1988), for failing to notify the pension plan's participants of the change in their pension plan. Finally, the jury found that the steel producer, by making the kickbacks, had engaged in a scheme to defraud the pension plan's beneficiaries in violation of the mail fraud statute, 18 U.S.C. § 1341 (1988).

The steel producer and the union officials, contending on several grounds that the trial court denied them a fair trial, and, in the case of the union officials, appropriate sentences, ask us to set aside the district court's judgment and order a new trial. We find their contentions meritless, and accordingly affirm their convictions and the union officials' sentences.

I.

The steel producer in this case is the USX Corporation ("USX"). Headquartered in Pittsburgh Pennsylvania, USX is a major steel manufacturer; it owns and operates a number of steel mills throughout the United States. The steel workers in these mills are represented by the United Steelworkers of America, International Union ("Union"), which also is headquartered in Pittsburgh, Pennsylvania. A prime, or "basic," collective bargaining agreement, negotiated by USX and the Union's principle officers every three years, governs, among other things, the rates of pay (including pension) of these workers.[1] "Local" collective

[1] The Union negotiates a basic collective bargaining agreement with each major steel producer in the United States, including USX; customarily it negotiates with all of the steel producers at the same time. The basic agreements, however, may differ from one company to another.

bargaining agreements (between USX and the Union's locals), which are negotiated after the basic agreement is reached, cover working conditions such as crew sizes, shift times, and craft assignments, at specific steel mills. These local agreements are negotiated by the Union's district directors and sub-district directors responsible for the Union's district in which the steel mill is located.

The plan that led to the kickbacks in this case evolved during the negotiation of a local agreement between USX and the ten locals at USX's Fairfield Steel Mill ("Fairfield") in Birmingham, Alabama. The negotiations began in September 1983, six months after USX and the Union had reached a basic agreement. At the time, the steel market was depressed and many of USX's mills were idle, including Fairfield. USX was not willing to resume production at these mills unless the locals agreed to a permanent reduction in the labor force, the elimination of "incentive" pay, and the discontinuation of certain restrictive work practices.

Fairfield was located in the Union's District 36.[2] Thermon Phillips and E.B. Rich, the Union officials convicted in this case, were District Director and Sub-District Director, respectively, of District 36; accordingly, the Union assigned them to negotiate the local agreement for the Fairfield steelworkers. William Miller, USX Vice President for Labor Relations, was the USX officer who met with Phillips and Rich and signed, for USX, the local agreement they eventually reached. Miller acted under the direction of J. Bruce Johnston, USX Executive Vice President for Employee Relations. Johnston, in turn, reported to David Roderick, the Chief Executive Officer and Chairman of the Board of Directors of USX.

Phillips and Rich were full time Union employees; the Union paid their salaries and provided their fringe bene-

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[2] District 36 covers Alabama, Florida, Louisiana, Mississippi, Puerto Rico, and the Virgin Islands.

fits. Years earlier, Phillips and Rich had worked for USX: Phillips from 1948 to 1951 and Rich from 1949 to 1964. At the time they left USX's employment, the basic agreement provided that a worker who wanted to leave USX to become a Union employee, such as a district or sub-district director, could request USX to grant him a one-year "leave of absence." If USX granted the leave, the worker would continue to accrue, for pension purposes, "continuous service" for one year; if requested, USX could extend the leave for one additional year. USX could not extend a worker's leave of absence beyond that, however, because the basic agreement contained a provision limiting a leave of absence to two consecutive years.[3] In order to prevent a break in his continuous service, and thus to save his pension, a worker who had left USX to accept Union employment had to return to USX before his leave of absence expired.

Neither Phillips nor Rich returned to USX after leaving its employment in 1951 and 1964, respectively; therefore, at the time they began negotiating the local agreement for the locals at Fairfield in 1983, they had lost whatever

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[3] The leave of absence provision as contained in the 1983 basic agreement read as follows:

> J. *Leaves of Absence for Employees Who Accept Positions with the . . . Union*[]
>
> Leaves of absence for the purpose of accepting positions with the . . . Union[] shall be available to a reasonable number of employees . . . .
>
> Leaves of absence shall be for a period not in excess of one year and may be renewed for a further period of one year.
>
> Continuous service shall not be broken by the leave of absence but will continue to accrue.

Not all steel producers limited leaves of absence to two years in their basic agreements; some granted indefinite leaves of absence to workers who accepted full-time positions with the Union. Thus, if a worker left such a company to work for the Union, he continued indefinitely to accrue "continuous service" for pension purposes.

right they may have had to receive a USX pension. Nonetheless, Phillips and Rich decided to condition the local agreement they were negotiating, and thus the resumption of production at Fairfield, on USX's willingness to award them enough "continuous service" to entitle them immediately to retire from USX's employment and receive a pension. They also decided to demand similar treatment for six members of Phillips' staff and Bruce Thrasher, the Union's District Director of District 35, all of whom were full-time union employees and ineligible for a USX pension.[4]

The negotiations over a new local agreement for Fairfield lasted approximately four months and involved several meetings. At the first meeting, Phillips and Rich told Miller that the Union could no longer abide the provision of the basic agreement that limited a leave of absence to two years; the Union wanted the provision amended to authorize the granting of an unlimited leave of absence for those who wished to leave USX to accept Union employment. Miller told Phillips and Rich that USX would not agree to such an amendment, and they did not pursue the matter.

Amending the basic agreement to remove the two-year limitation on leaves of absence would not have entitled Phillips and Rich to receive pensions from USX, because the proposed amendment would apply only to current USX employees, not to former employees who had severed all ties with the company. Whether or not Phillips and Rich were aware of this fact, they subsequently made their intentions clear when, following their second meeting with Miller, Rich took him aside, said "you accommodate us and we'll accommodate you," handed him a piece of paper, and told him to "take care" of the matter. The piece of paper read as follows:

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[4] All seven had worked for USX before becoming full-time employees of the Union, but all had been gone from USX for more than two years. Consequently, like Phillips and Rich, none of the seven was eligible for a pension.

> The persons whose names are listed below were active employees of [USX] until they were granted a leave of absence for a specified period of time. They are:
>
> *PHILLIPS, Thermon*
> THRASHER, Bruce
> WILLIAMS, Jimmie Lee
> GURLEY, Ralph T.
> *RICH, E.B.*
> STATUM, Carl
> PEARSON, Virgil L.
> SHEPHERD, Fred A.
> NEWELL, David L.
>
> Those leaves of absence are hereby extended for an indefinite period of time until such person dies or takes pension. Those listed employees will accrue continuous service for pension purposes only. Upon such time as the employee applies for pension, their pension will be calculated as if they had worked during the leave of absence (excluding percentage formula). The type and amount of pension will be governed by the [basic agreement] in effect at the time the employee applies for pension.

(Emphasis added) (social security numbers omitted). If USX agreed, Phillips and Rich (along with the others listed on the paper) would receive pensions with monthly payments of hundreds of dollars and present values of over $80,000. Miller sent the piece of paper to Johnston, who, after consulting Roderick, instructed Miller to reject Phillips' and Rich's request.

Following a meeting in October 1983, Phillips and Rich told Miller that there would be no local agreement at Fairfield until USX authorized the pensions. Miller

responded that the company knew of no way that the pensions could be paid. Negotiations on other issues continued.

While Miller and Phillips and Rich were negotiating a local agreement for Fairfield, USX also was negotiating local agreements with several of the Union's other district directors. In each case, USX demanded concessions similar to those being demanded from Phillips and Rich. The Union refused to grant the concessions, and by mid-November all negotiations ceased. Nevertheless, Miller continued to communicate with Phillips and Rich. On December 23, 1983, Miller met with Johnston and Roderick to review the situation at Fairfield; he told them that one of the items still "on the table" was the matter of pensions for Phillips and Rich and the seven other Union officials on their list. Johnston instructed Miller to reopen the negotiations, in a last ditch attempt to reach an agreement before the end of the year.

On the morning of December 24, Miller met with Phillips and Rich in Birmingham, and they reached an agreement and reduced it to writing. Phillips refused to sign the agreement, however, because USX had not agreed to authorize pensions for them and the other Union officials on their list. Miller immediately called Pittsburgh and reported this to Johnston, who had anticipated Phillips' refusal and was ready with an answer. He instructed Miller to tell Phillips and Rich that USX would consider their request for retroactive leaves of absence, and the "continuous service" it would bring, on the following conditions:

First, because the basic agreement's leave of absence limitation could not be amended by a local agreement, the basic agreement would have to be amended. Moreover, the Union would have to take the initiative and seek the amendment in separate negotiations between its officers in Pittsburgh and USX.

Second, USX would grant retroactive leaves of absence only to those Union officials who had left USX to work for the Union in or before November, 1979.[5]

Third, the resulting continuous service would qualify these Union officials for certain types of pensions only.[6]

Fourth, USX would consider pensions only for those who had gone directly from employment with USX to employment with the Union and had continuously serviced a USX steel mill thereafter.

Fifth, USX would consider pensions only for those who had worked for USX steel-producing facilities still in operation.

Sixth, USX would consider pensions only for those who were presently active Union officials.

Seventh, USX would make the pensions effective March 1, 1984.

Finally, Bruce Thrasher would not receive a pension under any circumstances.[7]

As soon as his conversation with Johnston ended, Miller relayed these terms to Phillips and Rich, who in turn asked Miller whether he believed USX would actually grant the pensions. Miller replied that USX would favorably consider the matter. With this assurance, Phillips signed the local agreement (the "Fairfield Agreement").[8]

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[5] Of the Union officials on Phillips' and Rich's list, the last one to leave USX to work for the Union left in November, 1979.

[6] The types of pensions available at that time to USX steel workers is not pertinent here, and will receive no further comment.

[7] Testimony at trial indicated that Johnston abhorred Thrasher.

[8] Soon after the Fairfield Agreement was signed, James Short, USX Vice President of Benefits, who also served as Vice President of the corporation administering USX's pension fund, the United States Steel and Carnegie Pension Fund, Inc., returned from a vacation and learned of the Fairfield Agreement. In particular, he learned that, under the agreement, the labor force at Fairfield

The Fairfield Agreement called for a reduction in both the work force at the mill and the incentive pay of its workers, as well as the elimination of most of the restrictive work practices; USX projected a savings in labor costs of over $24 million per year and consequently resumed steel production at Fairfield.[9]

In July 1984, several workers at Fairfield filed grievances against USX calling the interpretation of the Fairfield Agreement into question. Phillips and Rich, as part of their duties as district director and sub-district director, were responsible for determining whether the locals (to which the workers belonged) would prosecute the grievances, and, if the grievances were not resolved, whether to demand arbitration. When Johnston learned of these grievances, and the contract interpretation dispute, he asked Miller whether "we are in jeopardy of losing our momentum with [Phillips and Rich]." Miller replied: "[T]he thing that they have their eye on, and the thing that will affect this relationship, will be how we respond [to their request for pensions]." Johnston instructed Miller to tell Phillips and Rich that their pensions would be granted. Miller did so, and the grievances were withdrawn.

At this point, Johnston drafted an amendment to the basic agreement's leave of absence provision for submission to the Union. He did not submit the document to the Union, however, because he had been informed that the amendment, if adopted, might work to the detriment of

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had been reduced by 1,300 workers, all of whom had received "early retirement," and that USX was considering granting pensions to certain Union officials who were ineligible for USX pensions. As he believed it might be unlawful for USX to award such pensions, he asked USX's legal department to look into the matter. The record does not indicate what advice the legal department may have given Short.

[9] As USX had failed to get similar concessions from workers at other idle plants where concessions negotiations had taken place, USX permanently closed those plants within a few days.

Phillips and Rich; the Union members at Fairfield might learn of it and conclude that Phillips and Rich had betrayed them by granting several concessions in the Fairfield Agreement in exchange for a pension. In an effort to avoid this perception, Johnston abandoned his plan to have the basic agreement amended; instead, he decided to use USX's Corporate Policy Committee, on which he and Roderick served, as the vehicle for authorizing the pensions Phillips and Rich were demanding.

On October 22, 1984, Johnston submitted to the Committee a two-part proposal, which was adopted the same day.[10] First, Johnston proposed that the Committee amend the USX Personnel Manual, which informed USX's personnel decisions, to allow the Committee to grant leaves of absence to workers who left USX's employment to work for the Union for periods in excess of two years. The Personnel Manual, as then written, stated as follows:

> LEAVES OF ABSENCE
>
> 2. *Reasons for Granting Leaves of Absence*
>
> a. A leave of absence should be granted . . . for such reasons as death or illness in *the employee's* immediate family, for further education of *employees* . . . and for such other reasons as may appear proper *to the supervisor authorized to grant such leave.* (The remainder of the paragraph makes it clear that leave under this paragraph applies to current employees.)
>
> b. Leaves of absence will not be authorized to *enable employees to take other jobs.* . . . (This paragraph also applies to current employees.)
>
> c. The formal leave of absence procedure is not followed in the case of *an employee who is sick or*

[10] **The Committee adopted the proposals perfunctorily, because it considered Johnston, an established labor relations expert, to be the last word on the matter.**

otherwise physically disabled. (This paragraph also applies to current employees.)

d. Leaves of absence for the purpose of accepting positions with the international or local unions shall be available to a reasonable number of *employees* provided adequate notice of intent [on the part of the employee] to apply for leave is given to plant management to enable proper provisions for *filling the job to be vacated* and provided such leave is approved in advance by the office of the Vice President—Labor Relations, Pittsburgh. Such leaves of absence shall not break continuous service and shall be for not more than one year and may be renewed for a further period of one year at the discretion of the company.

(Emphasis added). Johnston proposed that the Personnel Manual be amended by placing the following language after the word "company" at the end of subparagraph d: "except as the Corporate Policy Committee approves the granting of a leave of absence for a longer period of time." The addition of this language did not change the obvious fact that subparagraph d applied to *current employees* who wished to take a leave of absence to work for the Union. The first proposal did not provide pensions for Phillips, Rich, and their colleagues, because they were not current USX employees; rather, it was designed to enhance USX's relationship with the Union by relaxing USX's leave of absence policy to permit indefinite leaves.

Second, Johnston proposed that the Committee grant retroactive leaves of absence to *former employees who* had left USX's employ to work for the Union and, *having exhausted their leaves of absence* (which were limited to a total of two years), *had lost any right they may have had to a USX pension.* Johnston expressed this part of his proposal to the Committee in the following language:

> Grant leaves of absence to former employees who meet the conditions specified below:
>
> A leave of absence shall be granted for the period between the date on which *the employee left active employment with United States Steel Corporation* [USX] and the earlier of (i) the date of retirement from [USX], or (ii) the date employment with the [Union] terminates, with the proviso that such leave of absence which is creditable as continuous service shall be used for the purpose of determining eligibility for any type of pension under the 1980 Non-Contributory Pension Rules and any successor thereto other than a 30 year, 60/15 or deferred vested pension and to determine the amount of pension under said rules, except that the pension provided with respect to such service shall be determined solely on the minimum formula of the rules; and further, that such leave of absence shall be granted only to employees of [USX's] current steel producing operations (e.g., . . . Fairfield) who (a) prior to January 1, 1978 left active employment with [USX] in order to accept or continue employment with the Union, (b) from the time of cessation of active employment until September 1, 1984 shall have continued in the active employment of the Union and (c) shall continuously have held position servicing bargaining units at the [USX] division in which he had been employed.

(Emphasis added). This provision gave Phillips and Rich exactly what they wanted. In fact, unbeknownst to Phillips and Rich, and perhaps even Johnston, this provision granted continuous service to approximately fifty Union officials who, due to a prolonged break in service, had long ago lost any pension rights they may have had while employed by USX.

A "Basis for Proposal" accompanied Johnston's two-part proposal and read as follows:

> It is felt that there is a distinct advantage to be dealing with [Union] representatives who were formerly employed by [USX] concerning potential problems and/or grievances and implementation of the various collective bargaining agreements. Thus, it is in the company's interest to foster and to promote the good will of former employees who were granted leaves of absence to work for the [Union].

Twenty-five days before he submitted his proposal to the Committee, Johnston, anticipating the Committee's adoption of his proposal, signed a PF-116 form—a standard company form that both recommends and authorizes pensions for the person or persons named in the form—for Phillips and Rich and four of the Union officials named on their list. USX did not authorize pensions for three of the Union officials on the list: Thrasher (because Johnston did not like him); Jimmy Williams (because he had died after Phillips and Rich gave Miller the list but before the pension payments began); and David Newell (because he lacked enough years, even counting the new "continuous service" credit to qualify for a pension). Johnston back-dated the form to January 1, 1984, and indicated on the form that the pensions would be effective March 1, 1984.

A PF-116 normally originates at the steel mill, where the mill manager, the "recommender," signs the form and thereby recommends that the employee be given a pension, and another management official at the mill, the "checker," determines whether the employee is qualified for the pension and signs the form. Then, the form goes to a higher official, in Pittsburgh, who signs the form as the "authorizer." Finally, the form returns to the mill, where the USX employee benefits office certifies to the corporation administering USX's pension fund, the United States Steel and Carnegie Pension Fund, Inc., (the "Administrator"), that the employee is entitled to a pension (in a specified amount). In this case, however, Johnston

signed the PF-116 as both the recommender and the authorizer. Tom Sterling, the Fairfield manager, signed the form as the checker.[11]

When the PF-116 arrived at the employee benefits office at Fairfield, the employees in the office questioned its propriety and reported the matter to their supervisor, who in turn called USX headquarters in Pittsburgh. After speaking to his superior there, the supervisor instructed the benefits office employees to "keep the matter quiet." The PF-116 never entered the benefits office's record system; the benefits office nevertheless certified to the Administrator that Phillips, Rich, and the four others named on the form were eligible for pensions.

After the benefits office notified the six Union employees that they were eligible for pensions, five of them (all except Phillips, who was in Florida at the time) came to the office and signed pension applications indicating that they had retired from USX effective March 1, 1984. One of the Union officials signed an application on behalf of Phillips. Although accepting such pensions violated the Union's rules,[12] all six continued to work for the Union.

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[11] As indicated in the text, *supra*, the second part of Johnston's proposal, if implemented, would render eligible for pensions approximately 50 Union officials who, due to the basic agreement's two-year limit on leaves of absence, were not entitled to receive them. In filling out the PF-116, neither Johnston nor anyone else at USX made any effort to identify these potential pensioners and to place their names on the form.

[12] The Union's Manual for Representatives expressly prohibited any Union official from receiving a pension from a company unless the pension was authorized by a collective bargaining agreement. Since USX and the Union had not renegotiated the two-year limitation on leaves of absence in the 1983 basic agreement, the Union policy prohibited the six from accepting USX pensions. The relevant provisions of that policy, which were conditions of Phillips' and Rich's employment with the Union, stated as follows:

> 4. No responsible trade union official should accept 'kickbacks,' under-the-table payments, gifts of other than nominal value, or any personal payment of any kind other than regular pay and benefits for work performed as an employee from an em-

Of the six Union officials granted pensions, only Rich met the requirements set out in the second part of the Johnston proposal as adopted. Phillips did not qualify because he left USX to work for another union, the CIO. The remainder did not qualify because they, as Union employees, did not service bargaining units at the USX division where they had been employed.

The Administrator finished processing the applications on November 19, 1984, and mailed the initial pension checks on December 1, 1984. From the end of 1984, when the payments began, to the middle of 1988, Rich and Phillips received $48,318 and $55,319 respectively.

Long before the Committee's decision here, USX and the Administrator had entered into a contract whereby USX undertook to perform some of the duties ERISA imposed on the Administrator. ERISA requires the administrator of a pension plan to notify the Department of Labor and all of the plan's participants of any material changes to the pension plan. The Corporate Policy Committee's decision to authorize pensions for Phillips and Rich and the approximately fifty other similarly situated Union officials constituted a material change in the pension plan; thus, such notification was required. Among the duties that USX assumed was the Administrator's duty to notify the Department of Labor and the pension

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ployer or business enterprise with which his union bargains collectively.

. . . .

6. *Leaves of Absence and Pension Credits.*

Representatives shall be entitled to obtain and maintain leave of absence status and/or pension credits from employers only to the extent that such leaves of absence and/or pension credits are *expressly granted or authorized by the terms of a collective bargaining agreement* with the [Union], and the duration of such leaves of absence and/or pension credits shall be in strict conformity to the limitations provided in such collective bargaining agreement.

(Emphasis added).

plan's participants of the Committee's creation of a new class of beneficiaries (by adopting the second part of the Johnston's proposal). USX, however, failed to notify the Department of Labor or the pension plan's participants that a new class of pension beneficiaries had been created.[13]

On November 15, 1989, a federal grand jury returned a sixteen-count indictment against USX, Phillips, and Rich. Count one charged all of the defendants with conspiring to make and receive payments prohibited by the Taft-Hartley Act, 29 U.S.C. § 186(a)(4) and (b). Counts two and three charged Rich and Phillips, respectively, with receiving payments in violation of section 186(b)(1). Counts four and five charged USX with making payments to Phillips and Rich in violation of section 186(a)(1). Counts six through fifteen charged USX, Phillips, and Rich with mail fraud in violation of 18 U.S.C. § 1341. Count sixteen charged USX with failing to notify the pension plan participants of the modification of their pension plan in violation of ERISA, 29 U.S.C. § 1131.

The case went to trial on March 5, 1990. At the conclusion of the government's case-in-chief on May 21, 1990, the district court granted the government's motion to dismiss the mail fraud charges against Phillips. The case went to the jury on the charges that remained on July 1, 1990. The jury acquitted Rich on the mail fraud counts but returned verdicts of guilty on all remaining counts against all three defendants. They now appeal their convictions; Phillips and Rich also appeal their sentences.

Of the claims of error raised on appeal, only three merit discussion. The first claim, addressed in Part II, is that

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[13] **The Corporate Policy Committee similarly failed to notify any USX officials, including those responsible for benefits and labor relations in the various field offices, of the creation of the new class of pension beneficiaries.**

the court's jury instruction on an exception to the prohibitions of the Taft-Hartley Act, 29 U.S.C. § 186(c)(1), precluded a legitimate defense argument, that a payment by an employee to his former employee is not prohibited by the Taft-Hartley Act so long as the payment was made "by reason of" the employee's service and was not a bribe. The two remaining claims, addressed in Part III, are: (a) that the district court's charge to the jury on the criminal enforcement provision of the Taft-Hartley Act, 29 U.S.C. § 186(d)(2), allowed the jury to convict on Counts two through five without finding the requisite level of criminal intent; and (b) that the court's jury instruction on the criminal enforcement provision of ERISA, 29 U.S.C. § 1131, similarly allowed the jury to convict on Count sixteen without finding the appropriate level of criminal intent.[14]

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[14] Appellants' other claims of error are patently meritless and do not warrant further discussion. These claims are: (1) the trial court erred in altering the indictment for counts two through five by deleting certain language, "intent to influence," as surplusage; (2) the trial court erroneously struck evidence concerning the practices of other steel producers in granting benefits to employees engaging in union activities and improperly instructed the jury to disregard such practices, thereby impeding appellants from contesting the mens rea element of the count one conspiracy charge; (3) the trial court erred in admitting evidence, including legal documents and related rulings from prior cases, concerning appellants' knowledge of illegality; (4) the trial court improperly refused to consolidate the trial of the instant case with the trial of the government's case against J. Bruce Johnston, thereby depriving appellants of Johnston's testimony (Johnston claimed Fifth Amendment immunity and did not testify at appellants' trial); (5) the trial court erroneously removed an essential element of the Taft-Hartley Act offenses from the jury by instructing the jury that USX's steelworkers were engaged in an industry affecting commerce; (6) the trial judge's overall conduct in the presence of the jury, in which he allegedly displayed a bias against appellants, deprived them of a fair trial; (7) the trial court erroneously excluded evidence, on the ground that it was irrelevant, that the government had approved of leave of absence provisions similar to the USX-Union basic agreement in effect when USX authorized

II

We first consider appellants' claim that the district court's charge to the jury regarding an exception to the Taft-Hartley Act was erroneous because it precluded a legitimate defense argument.[15]

The Taft-Hartley Act, 29 U.S.C. §§ 141-187, is, in part, a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement. *United States v. Pecora*, 798 F.2d 614, 622 (3d Cir.1986). To achieve this goal, Congress prohibited *all* payments from employers to representatives of their employees and union officials. Section 186(a) prohibits employers, in industries affecting interstate commerce, from paying anything of value to representatives of their employees or union officials.[16] Section 186(b) prohibits

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the pensions here in issue; (8) the trial judge erred in refusing to instruct the jury on appellants' good faith defense to the mail fraud charges; (9) the evidence was insufficient to establish a case of mail fraud against USX; (10) the evidence was insufficient to establish USX's noncompliance with ERISA; (11) the trial court admitted documents that had not been adequately identified; (12) the district court erred by quashing Phillips' and Rich's subpoenas for then Attorney General Richard Thornburgh and Fred Reebels, a labor mediator, and thereby deprived them of evidence that the government had approved leave of absence provisions similar to the provision contained in the USX-Union basic agreement in effect when the pensions here at issue were awarded; and (13) the trial court misapplied the United States Sentencing Commission Guidelines in fashioning Phillips' and Rich's sentences.

[15] Because a challenge to a jury instruction presents a question of law, our review is de novo. *See United States v. Chandler*, 996 F.2d 1073, 1085 (11th Cir.1993).

[16] The pertinent part of 29 U.S.C. § 186(a) provides as follows:

> It shall be unlawful for any employer . . . to pay, lend, or deliver . . . any money or other thing of value—
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> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> . . . .
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to

representatives and union officials from receiving such payments.[17]

Appellants' argument focuses on the district court's instruction to the jury concerning section 186(c)(1), which contains an exception to the broad prohibitions of sections 186(a) and (b). Section 186(c)(1) provides that sections 186(a) and (b) shall not be applicable "in respect to any money . . . payable by an employer to . . . any officer or employee of a labor organization, who is also an employee or former employee of such employer, *as compensation for, or by reason of, his service as an employee of such employer.*" (Emphasis added). The district court instructed the jury that the exception applies

> only to payments by an employer to former employees *for past services actually rendered* by those former employees *while* they were employees of the employer company. . . . [T]he Court further instructs you that whether payments in the form of USX Corporation pension payments and money paid thereby were made by or for USX Corporation to an individual defendant as compensation for or by reason of that defendant's past service as an employee of USX Corporation is a factual issue for you to decide from the evidence in the case.

(Emphasis added).

Appellants contend that the pension payments USX made to Phillips and Rich qualify for an exception under section 186(c)(1). Although appellants concede that

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influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

[17] The pertinent part of 29 U.S.C. § 186(b) provides as follows:

(1) It shall be unlawful for any person to request, demand, receive, or accept . . . any payment, loan, or delivery of any money or other thing of value prohibited by [section 186(a)].

the pension payments were not given "as compensation for" the past service of Phillips and Rich as USX employees, they argue that section 186(c)(1) also excepts payments given "by reason of" service as former employees, which, unlike compensation, need not be for past services actually rendered by those former employees while they were employees of the employer company. The district court, they contend, ignored the "by reason of" language in section 186(c)(1) and thereby precluded this legitimate defense argument.[18]

We disagree with appellants' interpretation of the trial court's jury instruction; we do not read it as ignoring the "by reason of" portion of section 186(c)(1). Congress, in using the alternative formulations of "as compensation for" and "by reason of" in that provision, intended to remove from the statute's prohibitions two general categories of payments to employees: (1) wages, i.e., sums paid to an employee specifically "as compensation for" work performed; and (2) payments not made specifically for work performed that are occasioned "by reason of" the fact that the employee has performed (or will perform, in the case of a current employee) work for the employer. *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (2d Cir. 1986). The latter category includes employee "fringe" benefits, such as vacation pay, sick pay, and pension benefits. *Id.* Whether "as compensation for" or "by reason of" service to an employer, all payments from an employer to a union official must relate to services actu-

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[18] Appellants contend that if we place our imprimatur on the district court's jury instruction, we will, in effect, render unlawful *per se* many legitimate fringe benefits, including no-docking provisions and the accrual of benefits (such as pension credits and seniority) during the period that an employee is on leave as a union official. "No-docking" provisions allow union officers who are full-time company employees to take time off from work, with pay, to conduct union business. This contention greatly overstates the reach of the district court's instruction, so we need not address it.

ally rendered by the employee for the section 186(c)(1) exception to apply.

Since it was undisputed that both Phillips and Rich had severed their employment relationship with USX before USX authorized their pensions, the district court accurately observed that the pension payments in this case must have been "for *past* services actually rendered by those *former* employees *while they were employees*" to fall within the section 186(c)(1) exception. (Emphasis added). Once an employee has severed the employment relationship with his employer, he is described accurately as a *former* employee. Because section 186(c)(1) only excepts payments given "as compensation for" or "by reason of" an employee's "service as an employee," a payment given to a *former* employee must be for services he rendered *while he was an employee* to qualify for the exception. A payment given to a *former* employee for present or future services, which by definition could not be "as compensation for" or "by reason of" his "service as an employee," would violate the plain language of the exception and would be exactly the type of conflict-tainted payment that Congress designed the Taft-Hartley Act to prevent.

Further, the trial court's jury instruction, and our interpretation of it, is entirely consistent with decisions of other courts interpreting section 186(c)(1). An employee's "right" to receive a "benefit" while on leave with the union has been upheld when it vested *before* the employee began the leave of absence to work for the union as well as *before* the employer delivered the benefits. Thus, the employer granted the benefits to the employee *for past services actually rendered* by the former employee *while* he was an employee of the employer, since the employee had earned the full right to receive the benefits before going on a leave of absence to work for the union. *See, e.g., NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir.1986) (finding that a collective

bargaining agreement granting employees certain benefits under the plan while they were on "union leaves" of absence from the employer fell within the § 186(c)(1) exception); *BASF Wyandotte Corp.*, 791 F.2d 1046 (same for no-docking provisions). In contrast, the section 186 (c)(1) exception does not apply when a company pays a union official who was a former employee, but who did not have a right to such payment before he severed his employment relationship with the company. In *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994, 110 S.Ct. 544, 107 L.Ed.2d 541 (1989), the Seventh Circuit, in an action against USX for denying pensions to Union officials who were eligible under the second part of the Johnston proposal as adopted, considered pension payments identical to those at issue in this case and found that they were illegal because they did not fall into any of the exceptions listed in section 186(c). The court stated that USX's policy

> cannot qualify as "compensation for or by reason of" former employment because . . . USX's leave policy was not a part of the bargained-for collective bargaining agreement. It was a unilateral change—under [USX's] own allegations, a bribe. That the change here was at least conducive to or suggestive of bribery . . . should indicate why it is not suitable for exemption from the general section [186] prohibition on gifts or loans from employers. Allowing more former employees to "get in" on the bribe would hardly further the purposes of section [186].

Id. at 1305 (footnote omitted). We agree with the Seventh Circuit that payments akin to those in this case do not fall within the section 186(c)(1) exception. When an employee's right to a benefit has fully vested before the leave of absence begins, there is no danger of corruption when the employer delivers the benefit after that employee leaves the company to work for the union; the employer is merely satisfying a preexisting obligation that

is unaffected by the employee's current status with the union. Where, however, as in the case before us, company officials ignore the company's collective bargaining agreement with a union and secretly grant retroactive leaves of absence, and thus pension benefits, to a small number of the union's officials (and those officials ignore union policy and accept the benefits), all of the evils that prompted Congress to pass the Taft-Hartley Act are present.

We hold that all payments given by an employer to a former employee must be for past service actually rendered by the former employee while employed by the employer to qualify for an exception under section 186(c)(1). Accordingly, because the jury charge in this case accurately stated the law, and because the question of whether appellants' actions conformed with the requirements of section 186 was properly left to the jury, we conclude that the district court committed no error and thus reject appellants' first claim.

III.

We next address appellants' claim that the district court misinterpreted the term "willfully" as used both in 29 U.S.C. § 186(d)(2) and in 29 U.S.C. § 1131, the applicable criminal enforcement provisions of the Taft-Hartley Act and ERISA, respectively. Appellants argue that the district court's misinterpretations resulted in jury instructions that set forth a prejudicially low standard of criminal intent for the charges under the Taft-Hartley Act and ERISA.[19]

As the Supreme Court has observed, the term "willfully" has " 'many meanings,' and 'its construction [is] often . . . influenced by its context.' " *Ratzlaf v. United States*, —— U.S. ——, ——, 114 S.Ct. 655, 659, 126

[19] Because these contentions present solely a question of law, our review is *de novo*. *See Chandler*, 996 F.2d at 1085.

L.Ed.2d 615 (1994) (quoting *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943)). *See also United States v. Murdock*, 290 U.S. 389, 395, 54 S.Ct. 223, 225, 78 L.Ed. 381 (1933) ("Aid in arriving at the meaning of the word 'willfully' may be afforded by the context in which it is used."). The interpretation of willfully "turns on [each case's] own peculiar facts." *Screws v. United States*, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495 (1945).

For instance, in some contexts, courts have interpreted "willfully" as requiring a finding of general intent, meaning the intent to engage in the prohibited conduct; that is, acting voluntarily, knowingly, and intentionally, and not accidently or mistakenly. *See, e.g., Browder v. United States*, 312 U.S. 335, 341, 61 S.Ct. 599, 603, 85 L.Ed. 862 (1941) (interpreting 22 U.S.C. § 220, which provides punishment for a person who knowingly and willfully uses any passport secured by the making of a false statement). Thus, a defendant need not intend to violate the law to commit a general intent crime, but he must actually intend to do the act that the law proscribes.[20] In other circumstances, courts have construed the term "willfully" to require a finding of specific intent, meaning the intent to violate the law; that is, acting with a "bad purpose" to disobey or disregard the law. *See, e.g., Cheek v. United States*, 498 U.S. 192, 200, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991) (interpreting the Internal Revenue Code and noting that the specific intent interpretation of "willfully" in the federal tax statutes is an "exception to the traditional rule" that "willfully" requires a finding of only general intent, applied "largely due to the complexity of the tax laws").

This appeal therefore requires us to make the same determination concerning each of the criminal enforce-

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[20] The term "law" in this context means the law as a whole, not any specific statute.

ment provisions under which the appellants were convicted: whether the use of the term "willfully" in each statute requires a finding of general or specific intent as we have defined those terms. While our inquiry is the same for the criminal enforcement provisions of both the Taft-Hartley Act, 29 U.S.C. § 186(d)(2), and ERISA, 29 U.S.C. § 1131, we must remain "mindful of the complex of provisions in which they are embedded." *Ratzlaf*, —— U.S. at ——, 114 S.Ct. at 659.

A.

We first address appellant's claim that the district court's misinterpretation of 29 U.S.C. § 186(d)(2), the applicable criminal enforcement provision of the Taft-Hartley Act, resulted in an erroneous jury charge that allowed the jury to convict on Counts two through five without finding the appropriate level of intent. This claim raises an issue of first impression in this circuit.

Appellants' argument centers on the trial judge's interpretation of the term "willfully" in section 186(d)(2), which provides that "any person who willfully violates [section 186] shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000. . . ." The district court instructed the jury that:

> [T]he Government is not required to prove that the pension payments were made by or for USX Corporation or received by the individual defendants with an evil or bad purpose or with the intent to violate the law or with knowledge that the law would be or was violated. Neither is it necessary . . . for the Government to prove that Thermon Phillips and E.B. Rich intended to be influenced by their acceptance and receipt of such pension payments or that they or either of them were in fact influenced by such payments. However, the Government must prove that the defendants acted "willfully". . . .

> The word "willfully" means that a person or entity charged as a defendant knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidently or by some mistake. For example, if USX Corporation caused a pension check to be sent to one of the individual defendants by accident or mistake, such as a computer error, such USX Corporation act would not be intentional and thus would not be willful. On the other hand, if USX Corporation intended for such a pension check to be sent and knowingly caused it to be sent then that act would be willful.
>
> The word "knowingly" imports only a knowledge of the existence of the facts in question. The word does not require, as a part of its meaning, that there be any knowledge or awareness that such act or omission is prohibited by law. . . .
>
> [T]he government [is not required] in this case to prove a specific intent by the defendant to violate this Taft-Hartley statute or a particular part thereof in order to establish the federal criminal offense charged.

Appellants maintain that section 186(d)(2) requires a finding of specific, and not merely general, intent, and that the district court therefore erred by not giving the Eleventh Circuit pattern jury instruction on "willfully," which defines the term as meaning "that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law." Eleventh Circuit District Judges Ass'n, *Pattern Jury Instructions: Criminal Cases,* Basic Instruction No. 9.1, 22 (1985). The term "bad purpose" does not mean evil motive, but merely the intent to act in knowing or reckless disregard of the law. *See United States v. Pomponio,* 429 U.S. 10, 12, 97 S.Ct. 22, 23-24, 50 L.Ed.2d 12 (1976). Thus,

according to appellants, the district court should have instructed the jury that the Government was required to prove that the defendants acted with specific intent, which means, at a minimum, that they acted with reckless disregard of the Act's prohibitions.

Initially, we note that appellants' reading of the statute is the minority view; the Second, Third, Sixth, and Ninth Circuits all have held that the term "willfully" as used in section 186(d) requires proof only of general intent.[21] Although appellants recognize that other circuits have interpreted section 186(d) as requiring a finding of only general intent, they maintain that these decisions are erroneous and based on a faulty reading of dictum in *United States v. Ryan*, where the Supreme Court stated that "[a]s [section 186] reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments,

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[21] *See, e.g., United States v. Cody*, 722 F.2d 1052, 1059 (2d Cir.) (requiring proof only that defendant "received and knew that he was receiving a benefit of value"), *cert. denied*, 467 U.S. 1226, 104 S.Ct. 2678, 81 L.Ed.2d 873 (1983); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir.1973) (requiring knowledge only "(1) that there were 'payments'; and (2) that the payments came from employers who employed workers represented by [defendant]"); *United States v. Carter*, 311 F.2d 934, 943 (6th Cir.) (quoting Hand, J., with approval: "the word 'willful,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law."), *cert. denied*, 373 U.S. 915, 83 S.Ct. 1301, 10 L.Ed.2d 415 (1963); *United States v. Bloch*, 696 F.2d 1213, 1216 (9th Cir.1982) ("A 'willful' violation of 29 U.S.C. § 186 requires only that the defendant act with knowledge that the payments are from a person acting in the interest of an employer . . . . [K]nowledge of the statutory prohibition itself is not necessary."); *see also United States v. Silva*, 517 F.Supp. 727, 735 (D.R.I.1980) ("The word 'willfully' means that the person knowingly and intentionally committed the acts which constituted the offenses charged . . . . The word does not require, as a part of its meaning, that there be any knowledge or awareness that such act or omission is in fact prohibited by law:"), *aff'd*, 644 F.2d 68 (1st Cir.1981).

with stated exceptions, between employer and representative." 350 U.S. 299, 305, 76 S.Ct. 400, 404, 100 L.Ed. 335 (1956). From this statement, appellants contend, the Second and Third Circuits erroneously concluded that knowledge of illegality is not an element of a criminal offense under section 186.[22] They urge this court to follow the specific intent interpretation approved by the Seventh Circuit. *See, e.g., United States v. Papia*, 910 F.2d 1357, 1362 (7th Cir.1990).[23]

Whether these decisions misread dictum in *Ryan* is not relevant, however, because there are two independent reasons, which these decisions do not discuss, why we should reject appellants' contention that section 186 (d)(2) requires a finding of specific intent. First, Congress designed the language and structure of section 186 around a general intent interpretation of "willful" in section 186(d). Second, Congress, recognizing the majority interpretation of "willful" in section 186(d) as requiring general intent, left the mens rea component unchanged

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[22] *See United States v. Ricciardi*, 357 F.2d 91, 100 (2d Cir. 1966); *United States v. Lanni*, 466 F.2d 1102, 1110 (3rd Cir.1972); *see also Carter*, 311 F.2d at 943-44 (citing *United States v. Ryan*, 232 F.2d 481 (2d Cir.1956) (on remand from the Supreme Court)); *Bloch*, 696 F.2d at 1216 (citing *Carter*).

[23] In *Papia*, the court rejected the argument that the appellant was entitled to a jury instruction that "[a] person who intentionally performs an act, aware that the law prohibits the act, or in reckless disregard of the law's prohibition, has intentionally done an act forbidden by law," because the court saw little difference between the requested instruction and the given instruction, "[a]n act is done 'willfully' if done voluntarily and intentionally, and with the intent to do something the law forbids; that is to say, with a purpose either to disobey or disregard the law." *Id.* at 1362. The court, however, did not reach the question of whether the Act requires an instruction that a person must act "with a purpose either to disobey or disregard the law" to be convicted, because the trial court had given a specific intent instruction. Thus, we do not read *Papia* as involving the same issue involved in this case.

when it created section 186(d)(2) in 1984. We discuss each reason in turn.

1.

After briefly reviewing the statutory scheme of section 186, we explain why the language of section 186 and the dual structures of both section 186(a) and section 186(d) compel the conclusion that Congress intended "willfully" in section 186(d) to require a finding of only general intent.

a.

Section 186 is divided into four parts; section 186(a) prohibits employers, in industries affecting interstate commerce, from paying anything of value to "representatives" of their employees or union officials; section 186(b) prohibits representatives and union officials from receiving such payments; section 186(c) provides nine exceptions to the prohibitions of sections 186(a) and (b); and section 186(d) contains the criminal enforcement provisions of the Taft-Hartley Act.

Section 186(c) contains two types of exceptions. The first three exceptions, sections 186(c)(1)-(3), describe payments that do not have the potential for corrupting the labor movement. Section 186(c)(2), for example, contains an exception for payments "in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress." The last six exceptions, sections 186(c)(4)-(9), describe payments that could corrupt the labor movement unless certain protective requirements are met. These sections describe the type of payment that is eligible for the exception and then outline the technical requirements that must be met before a payment will qualify for the exception. For example, section 186(c)(4) provides that sections 186(a) and (b) shall not be applicable

> with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

Thus, section 186 envisions three general classes of payments: payments that are always illegal (for which Congress did not provide an exception in section 186(c)); payments that are always legal (for which Congress provided the exceptions in sections 186(c)(1)-(3)); and payments that may be legal if they satisfy certain technical requirements (for which Congress provided the exceptions in sections 186(c)(4)-(9)).

Before Congress amended section 186 in 1984, the criminal enforcement provision in section 186(d) provided that "[a]ny person who willfully violates any of the provisions of . . . section [186] shall . . . be guilty of a misdemeanor." Congress, recognizing that "[f]ederal prohibitions and penalties designed to protect the legitimacy of labor relations have . . . proved to be inadequate," strengthened the Taft-Hartley Act in 1984, making a payment or receipt of over $1,000 punishable by up to five years imprisonment. Senate Comm. on the Judiciary, Comprehensive Crime Control Act of 1984, S.Rep. No. 225, 98th Cong., 2d Sess. 297 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477.

Congress acknowledged, however, that the payments described in sections 186(c)(4)-(9) do not generally involve payoffs, bribes, or conflicts of interest, and that one could violate the Act merely by failing to satisfy a technical requirement. *Id.* at 297, *reprinted in* 1984 U.S.C.C.A.N. at 3477. To avoid the imposition of heightened penalties for "inadvertent" conduct, Congress divided

the criminal enforcement provision in section 186(d) into two parts.[24] The first part, section 186(d)(1), applies only to violations caused by payments that could have fallen within the exceptions provided by sections 186 (c)(4)-(9) had the payments met their requirements. Section 186(d)(1) requires proof that a person participated in a payment "willfully *and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment. . . .*" The second part, section 186(d)(2), applies to all violations not covered by section 186(d)(1), including the violations in this case. The mens rea component of section 186(d)(2) remains unchanged from the former section 186(d); it requires proof only that a person "willfully violate[d] this section."

b.

The only difference between sections 186(d)(1) and (d)(2) is the additional "intent" requirement of section 186(d)(1). Section 186(d)(1) now requires that the government establish more than general intent, namely that the defendant participated in a payment "willfully and with intent to benefit himself or the benefit other persons he knows are not permitted to receive . . . a thing of value." Congress had to have intended the term "will-

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[24] As amended, section 186(d) provides as follows:

(d) Penalty for violations

(1) Any person who participates in a . . . payment . . . [which] does not satisfy all of the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment . . . shall . . . be guilty of a felony [if value of payments exceeds $1,000] . . . .

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section . . . shall . . . be guilty of a felony [if value of payment exceeds $1,000] . . . .

29 U.S.C. § 186(d) (1988).

fully" as used in both sections 186(d)(1) and (d)(2) to require a finding of general intent; otherwise, the "intent to benefit" language in section 186(d)(1) would be superfluous, because a person who had the specific intent to violate the Taft-Hartley Act would also necessarily intend to benefit himself or to influence a union official. Under appellants' interpretation, the additional intent requirement of section 186(d)(1) would serve only to except payments made with the specific intent to violate the law, but without the intent to benefit himself or to influence the recipient. We seriously question whether this scenario could actually occur, let alone whether Congress intended such an absurd statutory scheme. It is well established that "[j]udges should hesitate . . . to treat statutory terms [as mere surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf*, —— U.S. at ——, 114 S.Ct. at 659. Moreover, had "willfully" in section 186(d) required a finding of specific intent before the 1984 amendment, Congress would not have needed to create section 186(d)(1) to avoid the imposition of heightened penalties for inadvertent conduct.

c.

Appellants' interpretation of "willfully" also renders other aspects of the statutory scheme of the Taft-Hartley Act meaningless. In sections 186(a)(1) and (a)(2), Congress prohibited *any* payment by an employer to an employee representative.[25] In sections 186(a)(3) and

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[25] The pertinent part of 29 U.S.C. §§ 186(a)(1)-(2) provides as follows:

> It shall be unlawful for any employer . . . to pay . . . any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such

(a)(4), Congress prohibited *any* payment by an employer to a *larger class* of individuals and groups, including union officials, union employees, and individuals or groups who could influence employee representatives, if the payment was made with the "intent to influence" the recipient.[26]

Given that the "intent to influence" language is in sections 186(a)(3)-(4) and not in the section 186(d)(2) criminal enforcement provision, Congress must have intended sections 186(a)(1)-(2) to prohibit payments to representatives even if they were made without any intent to influence. Any other interpretation would render the requirement of "an intent to influence" in sections 186(a)(3) and (a)(4) mere surplusage. Under appellants' interpretation of "willfully" in section 186(d), sections 186(a)(1) and (a)(2) would serve only to prohibit payments made to employee representatives without any intent to influence but with the specific intent to violate the law. We cannot agree with such a nonsensical result; the statutory scheme is coherent and rational when "willfully" is interpreted as requiring only general intent.

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employer who are employed in an industry affecting commerce . . . .

[26] The pertinent part of 29 U.S.C. §§ 186(a)(3)-(4) provides as follows:

> It shall be unlawful for any employer . . . to pay . . . any money or other thing of value—
>
> (3) to any employee or group or committee of employees of such employer . . . in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly *to influence* any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) to any officer or employee of a labor organization . . . *with the intent to influence* him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(Emphasis added).

d.

For these reasons, appellants' interpretation of the term "willfully" in section 186(d) is illogical and inconsistent with the language and structure of the Taft-Hartley Act. The double enforcement provision in section 186(d) and the dual structure of prohibited payments in section 186 (a) suggest that Congress intended the term "willfully" to require proof only that the payment was made knowingly and intentionally, not accidentally or by some mistake.

2.

The second reason for rejecting appellants' interpretation of the term "willfully" in section 186(d) is based not upon what Congress expressly provided in the language and structure of section 186, but upon what Congress left unchanged when it amended the section 186(d) criminal enforcement provision in 1984. When Congress amended section 186(d) in 1984, it made no attempt to change the clear majority rule that "willfully" required a finding of only general intent.[27] Because Congress left

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[27] By 1984, the Second, Third, Sixth, and Ninth Circuits had interpreted the term "willfully" in section 186(d) as requiring only proof of general intent. *See, e.g., Cody,* 722 F.2d at 1059; *Pecora,* 484 F.2d at 1294; *Carter,* 311 F.2d at 943; *Bloch,* 696 F.2d at 1216; *see also Silva,* 517 F.Supp. at 735. The only circuit holding to the contrary was the Seventh Circuit. The Seventh Circuit cases, however, were contradictory and internally inconsistent. In *United States v. Inciso,* 292 F.2d 374, 380 (7th Cir.), *cert. denied,* 368 U.S. 920, 82 S.Ct. 241, 7 L.Ed.2d 135 (1961), the court held that section 186(d) "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section." In *United States v. Keegan,* 331 F.2d 257, 261-62 (7th Cir.), *cert. denied,* 379 U.S. 828, 85 S.Ct. 57, 13 L.Ed.2d 37 (1964), however, the court held that a jury instruction requiring proof of only the first element of a two-part definition of reckless conduct, "knowledge of the material facts surrounding the proscribed conduct," without the second element, "whether a reasonable man would be aware that such conduct would likely be illegal,"

the willfulness requirement of former section 186(d) unchanged when it created section 186(d)(2) in 1984, we can only assume that Congress intended "willfully" to require a finding of only general intent. Congress is presumed to be knowledgeable about existing case law pertinent to any legislation it enacts, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990), and about the basic rules of statutory construction, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496, 111 S.Ct. 888, 898, 112 L.Ed.2d 1005 (1991).

Congress, had it intended "willfully" to require specific intent, would have taken steps to ensure that the statute overruled those cases holding otherwise. Conspicuously, signs of congressional intent to change the majority rule are absent from both the face of the statute and the legislative history. When considered with the language and structure of the statute, the absence of signs of congressional intent to overrule the prior cases bolsters our conclusion that the term "willfully" requires a finding of general intent.

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was sufficient. *See also United States v. Kaye*, 556 F.2d 855, 863-64 (7th Cir.) (following *Keegan*), *cert. denied*, 434 U.S. 921, 98 S.Ct. 395, 54 L.Ed.2d 277 (1977). A jury instruction consisting of only the first element of reckless conduct, knowledge of the material facts surrounding the proscribed conduct, is the practical equivalent of a general intent jury instruction.

The Tenth Circuit discussed section 186(d) in *Korholz v. United States*, 269 F.2d 897, 903 (10th Cir.), *cert. denied*, 361 U.S. 929, 80 S.Ct. 367, 4 L.Ed.2d 352 (1959), and upheld a jury instruction that a person must be "either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not." The court's discussion is too cryptic, however, to draw a conclusion about whether a general intent instruction would have been upheld. Consequently, the Tenth Circuit cannot be said to have clearly ruled on this issue at the time of the 1984 amendment of section 186(d).

3.

In sum, the language of section 186, the dual structures of sections 186(a) and 186(d), the case law interpreting 186(d) at the time Congress amended section 186, and the legislative history of the Taft-Hartley Act support the conclusion that Congress intended section 186(d)(2) to require a finding of only general intent. Despite these indications that Congress intended section 186(d)(2) to require a finding of only general intent, appellants contend that section 186(d)(2) requires a finding of specific intent, because the Taft-Hartley Act, like the Internal Revenue Code, is a complex statute that has been subject to widely disparate interpretations. They argue that Congress, particularly in a statute like the Taft-Hartley Act in which the boundaries of permissible action are ambiguous, intends the term "willfully" to create felony culpability only for those persons who know that their actions violate the law, or who recklessly disregard whether they have the right to act in the manner they have chosen.

The facts of this case illustrate perfectly why Congress intended the term "willfully" in section 186(d)(2) to require a finding of only general intent to sustain a conviction. Neither USX nor Phillips and Rich needed to consult section 186 to determine that their actions, in paying and receiving the pensions, were illegal; they knew these acts were illegal. Section 186 codifies a basic moral tenet: an employer should not bribe a representative of his employees (or make any payments that could be perceived as a bribe), and such a representative should not accept a bribe) or any payment that could be perceived as a bribe). Appellants, of course, knew this. In enacting section 186, Congress simply prohibited people, such as Phillips and Rich and the USX officials involved in this case, from committing acts that they should know are inherently wrong—whether or not they were aware of the text of section 186 is of no moment. Accordingly, the district court's jury charge accurately described the mens

rea requirement of section 186(d)(2) of the Taft-Hartley Act.

B.

We next consider USX's claim that the district court's charge to the jury with respect to the ERISA violation alleged in Count 16 set forth a prejudicially low-standard of criminal intent. Again, the solution to the problem focuses on the proper interpretation of the term "willfully," and on whether the ERISA criminal enforcement provision requires a finding of general or specific intent. At issue is section 1131 of ERISA,[28] which makes it a criminal misdemeanor willfully to violate Part 1 of ERISA, which contains the reporting and disclosure requirements governing those who control and administer employee benefit plans. Part 1 of ERISA requires the administrator[29] of a pension plan to notify the Department of Labor and the plan's participants and beneficiaries of any material modifications in the terms of the pension plan, such as the creation of a new class of pension beneficiaries. 29 U.S.C. § 1021 (1988).[30]

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[28] The pertinent part of 29 U.S.C. § 1131 (1988) provides as follows:

> Any person who willfully violates any provision of part 1 of [ERISA], . . . shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

[29] USX, by a contract with the Administrator of the USX pension fund, had assumed the duty ERISA imposes to report and disclose material modifications of the pension plan; consequently, USX was the "administrator" for the purpose of ERISA's reporting and disclosure requirements.

[30] The relevant provision in 29 U.S.C. § 1021 (1988), which provides in pertinent part:

> The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this

The district court charged the jury that a defendant who "knowingly and intentionally committed acts which [violated Part 1 of ERISA] and . . . were not committed accidentally or by some mistake" was guilty of violating Part 1 of ERISA. USX argues that section 1131 prohibits violations of Part 1 of ERISA caused by "act[s] committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose to disobey or disregard the law." In support of this position, USX argues simply that ERISA is a complex statute; therefore, Congress intended "willfully" to require a finding of specific intent. USX, however, does not point to anything within the statute itself to support its argument. After examining the language and stucture of ERISA, we cannot agree with USX's interpretation.

As explained by Congress, Part 1 of ERISA is designed: (1) to require the disclosure of significant information about employee benefit plans and all transactions engaged in by those specific data to plan participants and beneficiaries about the rights and benefits to which they are entitled and the circumstances that may result in a loss of those rights and benefits; and (3) set forth the responsibilities and proscriptions applicable to persons occupying a fiduciary relationship to employee benefit plans. *See* House Education and Labor Committee, Employee Retirement Income Security Act of 1974, H.Rep. No. 533, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4648-49. To achieve the third goal, Congress codified a " 'prudent man' standard for evaluating the conduct of all fiduciaries." *Id.* at 4649. In doing so, Congress placed a

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title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in sections 1024(b)(3) and 1025(a) and (c) of this title.

> twofold duty on every fiduciary: to act in his relationship to the plan's fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated, and in accordance with the documents and instruments governing the fund unless they are inconsistent with the fiduciary principles of the section.

Id. at 4651.

Consistent with the codification of a prudent man standard, Congress, in 29 U.S.C. § 1028 (1988), provided a detailed set of exemptions from prohibited transactions and included a good faith defense for reliance on administrative interpretations. Section 1028 provides in pertinent part that

> [i]n any criminal proceeding under section 1131 of this title, based on any act or omission in alleged violation of [ERISA Part 1] . . . , no person shall be subject to any liability or punishment for or on account of the failure of such person to (1) comply with [ERISA Part 1] if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any regulation or written ruling of the Secretary, or (2) publish and file any information required by any provision of this part if he pleads and proves that he published and filed such information in good faith, and in conformity with any regulation or written ruling of the Secretary issued under this part regarding the filing of such reports. . . .

Thus, section 1028 serves to outline clearly the responsibilities of those in a fiduciary relationship to employee benefit plans and to ensure that the statutory codification of the prudent man standard is not undermined by later interpretations of ERISA. In short, Congress, in section 1108, specifically outlined what would serve as a valid

defense to a violation of the reporting and disclosure requirements.

This statutory good faith defense is necessary, only if a violation of the ERISA criminal enforcement provision in section 1131 is based only upon a finding of general intent. Under USX's construction, section 1108 would be superfluous because the government would have to prove specific intent for violations of Part 1 of ERISA; good faith is a complete defense to specific intent crimes. Although section 1108 could serve to limit the defenses that would be available if section 1131 required a finding of specific intent, this interpretation would, in effect, render "willfully" mere surplusage.

The only logical interpretation of Part 1 of ERISA is that the term "willfully" in section 1131 requires a finding of only general intent and that section 1108 provides additional statutory defenses not otherwise present for general intent crimes. Under this interpretation, sections 1131 and 1108 serve distinct purposes; the term "willfully" as used in section 1131 ensures that the act was done voluntarily and not by accident or mistake; and section 1131 provides the proper scope of defenses in accordance with the codified "prudent man" standard as determined by Congress. To interpret otherwise would render either the defenses in section 1108 or the term "willfully" in 1131 meaningless surplusage. Consequently, we conclude that the district court's charge to the jury sufficiently and adequately described the mens rea required for violations of ERISA Part 1.

IV.

For the reasons discussed above, we find no merit in any of appellants' claims of error. Accordingly, the judgments of district court are affirmed.

IT IS SO ORDERED.

APPENDIX B

[Filed Aug. 9, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7721

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THERMON PHILLIPS; E. B. RICH and
USX CORPORATION, a/k/a
United States Steel Corporation,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, COX, Circuit Judge, and FAY, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
United States Circuit Judge

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* This order pertains to all defendants-appellants.

APPENDIX C

STATUTES INVOLVED

UNITED STATES CODE ANNOTATED TITLE 29, SECTION 186 (1978 & SUPP. 1994)

§ 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of

employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 10102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an

arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure

to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds:

Provided further, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalty for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this

section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

Effective date of provisions

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

Contributions to trust funds

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection

(c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; Sept. 14, 1959, Pub.L. 86-257, Title V, § 505, 73 Stat. 537; Oct. 14, 1969, Pub.L. 91-86, 83 Stat. 133; Aug. 15, 1973, Pub.L. 93-95, 87 Stat. 314.

(As amended Oct. 27, 1978, Pub.L. 95-524, § 6(d), 92 Stat. 2021; Oct. 12, 1984, Pub.L. 98-473, Title II, § 801, 98 Stat. 2131; Apr. 18, 1990, Pub.L. 101-273, § 1, 104 Stat. 138.)

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No. 94-830

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

USX CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MEMORANDUM FOR RESPONDENTS' THERMON PHILLIPS AND E.B. RICH IN SUPPORT OF THE PETITION

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MEMORANDUM FOR RESPONDENTS' THERMON PHILLIPS AND E.B. RICH IN SUPPORT OF THE PETITION

Thermon Phillips and E.B. Rich are parties to the instant case by reason of their status as individual defendants in the district court and as appellants in the court of appeals. See Petition For Writ of Certiorari p. ii. On the same day as the instant *certiorari* petition was filed, Mr. Phillips and Mr. Rich filed a separate *certiorari* petition seeking review of the decision below. *Thermon Phillips and E.B. Rich v. United States of America, et al.*, Supreme Court No. 94-831 (pending).

As provided for in Rule 12.4, Thermon Phillips and E.B. Rich file this memorandum (a) to state their support of the position of petitioner USX Corporation; and

(b) to urge the Court to grant *certiorari* in both No. 94-830 and No. 94-831 and to consolidate the petitions for the purpose of the proceedings on the merits in this Court.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 220,000 companies and several thousand other organizations such as state and local chambers of

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.2. Letters of consent are being filed simultaneously with the Clerk of Court.

commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation.[2]

This case presents two important and interrelated questions: (1) whether an employer who grants pension credits and payments to former employees on leave to work for a labor organization representing its employees violates Section 302 of the Labor-Management Relations Act ("LMRA"), as amended, 29 U.S.C. § 186; and (2) whether the mere fact of such grants entails criminal liability.[3]

The Court's resolution of these issues is of vital concern to the Chamber and its members, many of whom

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[2] *See, e.g., Livadas v. Bradshaw*, ___ U.S. ___, 114 S.Ct. 2068 (1994); *ABF Freight Syst., Inc. v. NLRB*, ___ U.S. ___, 114 S.Ct. 835 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

[3] This case also raises the question of whether such former employees who *receive* pension credits and payments from their former employers also engage in criminal conduct under Section 302.

have a long-standing practice of granting pension benefits to former employees who have taken leave to work for labor organizations that represent their employees in collective bargaining. The Circuit Court's incorrect application of Section 302 of the LMRA is likely to chill the continuation of this widespread, and salutary, employer practice. Accordingly, the Chamber submits this brief *amicus curiae* in support of the Petitioner.

PRELIMINARY STATEMENT

In October 1984 – some 10 months after USX and the United Steelworkers of America ("Steelworkers" or "the Union") successfully concluded an agreement that reopened the Company's idled Fairfield Works, located outside of Birmingham, Alabama[4] – USX adopted a resolution changing its leave of absence policy for employees of all its current steel producing operations. The revised policy provided that under certain conditions former USX employees who left the Company's employ to serve as full-time Union officials would be eligible for retroactive leaves of absence of indefinite duration which would render them eligible for accrued pension service credits. The stated reason for the changed policy was that USX believed that it was in its interest that potential plant

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[4] In June of 1982, USX had indefinitely idled the Fairfield plant because of substantial operating losses. After 19 negotiating sessions between USX and the Union, an agreement was reached in late 1983 for the plant's reopening at an ultimate cost to USX of some $200 million.

problems, grievances, and the implementation of collective bargaining agreements be handled by former employees familiar with USX's policies and operations.

In late November 1984, pensions were granted and paid under the changed policy to six Steelworkers International representatives. Included in the grant were two Union officials who had negotiated the Fairfield Works reopening, E.B. Rich and Thermon Phillips, and who had previously been employed at the Fairfield Works. Some five years later, on November 15, 1989, the United States Government brought a 16-count indictment against USX, Rich and Phillips, charging, *inter alia*, that they had criminally violated Section 302.[5]

The indictment originally alleged that USX and negotiators Phillips and Rich engaged in a subterfuge in which USX granted the latter pension credits entitling them to pensions they otherwise would not have received as a "reward" – *i.e.*, a *quid pro quo* – for Phillips and Rich approving and administering the new collective bargaining agreement at USX's Fairfield Work's operation in a manner favorable to USX. Had the case been tried and

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[5] Among other things, Section 302 of the LMRA prohibits an employer from paying any money or other thing of value to officers or employees of a labor organization that represents the employer's employees; it also prohibits such union officers or employees from requesting or receiving any money or other thing of value from any such employer. Section 302(c)(1), however, exempts from the 302 prohibitions payments made to a union officer or employee "who is also an employee or former employee of such employer, as compensation for, *or by reason of*, his service as an employee of such employer" (emphasis added).

decided on this basis, it would have created relatively little consternation in the labor-management community. Instead, during the course of the trial, the district court granted the Government's request to delete the "reward" language from the indictment. As thus changed, the indictment charged only that the pension payments to Phillips and Rich were unlawful because they were paid "not as compensation for or by reason of [either Phillips' or Rich's] service . . . as an employee" of USX Corporation. Moreover, the district court's subsequent jury instructions effectively eliminated the "by reason of" language from the Section 302(c)(1) exemption. Finally, by instructing the jury that the Government was not required to prove that the payments were made or received with "an evil or bad purpose" or even with any "intent to violate the law," the district court, as affirmed by the Eleventh Circuit, essentially ruled that all transgressions of Section 302, no matter how unwitting, were criminal.

REASONS FOR GRANTING THE WRIT

As aptly demonstrated by the Petition for Writ of Certiorari, intolerable uncertainty for employers and union members alike is created by the "patchwork of rights and risks" (Pet. p. 10) that attends the conflict in the holdings among the circuits concerning issues of whether an employer may, without incurring felony liability, grant former employees continuing credit toward company sponsored pensions after they go to work full time for their unions.

I. THE ERRONEOUS DECISION BY THE COURT OF APPEALS WILL DESTABILIZE UNION-MANAGEMENT RELATIONS.

The manner in which this case was prosecuted and the endorsement of that prosecution by both courts below seriously impacts an important aspect of traditional union-management labor relations – the practice of granting pension benefits to employees on union leave. But the matter extends beyond the parameters of the practice involved in this case, for the court of appeals' rulings also cast a cloud over other important and related facets of traditional union-management practices, the so-called "no-docking" practices. Thus, it is a widespread employer-union practice – a practice memorialized in hundreds of collective bargaining agreements – for employees to be granted time off, with pay and without the loss of seniority or benefits, to engage in activities on behalf of their union and their fellow employees. Such leave is frequently granted to union officers or other union officials to enable them to engage in such activities as labor contract negotiations and contract administration, grievance handling, health and safety committee work, administration of welfare and other benefit plans, substance abuse prevention, apprentice training, the administration of job security programs and time studies. These activities may be performed both in-plant and at other locations.

Similarly, collective bargaining agreements frequently provide for the establishment of so-called joint committees, comprised of both management representatives and employee union representatives who are granted time off with pay, benefit and seniority retention.

Functioning on both multi-plant (national) and local plant levels, these committees are assigned objectives such as the improvement of the efficiency of plant operations; the increase of job opportunities; the improvement of product quality; the identification of cost savings; the reduction of employee absenteeism; the improvement of job training programs; the maintenance and improvement of safe and healthful working environments; the assistance of employees in avoiding and recovering from alcoholism and drug dependency; and the furtherance of equal employment opportunity programs.[6]

The Chamber submits that these "no-docking" practices differ from full-time union leave only in degree and not in kind. Indeed, in very large bargaining units governed by mature union contracts, even that difference in degree is sometimes eliminated by the fact that some employees may be "released" for up to 40 hours of union work per week. In essence, then, employees sometimes work full-time on union business while being paid wages and benefits by the employer – a situation that cannot be viewed as any less "pernicious" than the practice of granting pension credit accrual while on extended leaves of absence for full-time union work.

As for the specific practice at issue here, the 1980 Department of Labor Report confirms that numerous

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[6] A 1980 United States Department of Labor Report confirms that numerous employers in the United States allow paid time off for union-related activities. *See Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business*, Bulletin 1425-19, U.S. Department of Labor (Oct. 1980) (hereafter "DOL Report"), pp. 16-17.

employers in the private sector allow employees to take leaves of absence to serve as full-time union officers or staff. *See* DOL Report, pp. 27-29.[7] The large percentage of employers maintaining the practice is also noted in a Bureau of National Affairs study, *Policies on Leave From Work*, Personnel Policies Forum Survey No. 136, Bureau of National Affairs (1983), p. 34. Often the leave that is allowed for full-time service as a union officer is "open-ended" as to duration or for relatively long periods; and when shorter leave periods are granted initially, extensions for additional periods, some quite lengthy, are frequently granted by management. DOL Report, pp. 21-23, 28.

The Department of Labor Report also shows that many employers allow employees on union leave to continue to accrue benefits, including pension benefits. DOL Report, pp. 25-26. *See also Communication Workers of America, AFL-CIO v. Bell Atlantic Network Serv., Inc.*, 670 F.

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[7] The DOL Report states (p. 27):

> Leave of absence clauses pertaining to union employment appeared in 761 of the 1,765 agreements, covering 3.8 million of the nearly 8 million workers. . . . Clauses were found in 62 percent of the manufacturing agreements, and 25 percent of those in nonmanufacturing. Clauses were found in more than 75 percent of the contracts for transportation equipment, non-electrical machinery, utilities, fabricated metal products, ordnance, tobacco, and mining. . . . Provisions were found in 75 percent or more of the agreements held by the Auto Workers, Rubber Workers, Steel Workers, and Machinists agreements, as well as a number of smaller unions such as the Tobacco Workers, Chemical Workers, and Utility Workers.

Supp. 416, 421 (D.D.C. 1987) (observing that full-time union leave benefits had "been included in collective bargaining agreements between the parties for many years, in some instances for three to four decades."). The latter benefits include pension benefits, reduced-premium medical insurance, no-charge life insurance, and discounted telephone services.

The rewards derived from all of these practices are obvious. They further collaborative efforts between employers, unions and employees, and they thereby help to improve productivity, increase efficiency, and reduce labor costs. When former employees represent a union in contract negotiations, they bring to the bargaining table their familiarity with a company's production methods and plant practices, with needed employee skills, and with employee gripes and satisfactions. Such knowledge on the union side helps to minimize irrelevant discussions and unnecessary frictions between the bargainers; it also facilitates the achievement of speedy compromises and realistic solutions to problems. Similarly, when incumbent employees are charged with grievance handling, the processing of meritless complaints can be reduced, employee claims can be pressed forcefully and skillfully, and management can be expected to respond objectively.

Not surprisingly, many of the Chamber's member employers have a long-standing practice of granting pension benefits to former employees who have taken leave to work for labor organizations that represent their employees in collective bargaining. The Chamber endorses the practice and believes that it: (1) advances the interests of employees to engage in self-organization

and to bargain collectively; (2) enhances the efficacy of the collective bargaining process; and (3) promotes the friendly adjustment of industrial disputes concerning employees' wages, hours, and other working conditions. The practice therefore furthers a number of the declared policies underlying the National Labor Relations Act. *See* 29 U.S.C. § 151. The erroneous "criminalization" decision of the Circuit Court inhibits not only the continuation of the practice herein at issue, but also the other traditional, and salutary, union-management practices enumerated above.

II. THE COURT OF APPEALS MISCONSTRUED SECTION 302 OF THE LABOR-MANAGEMENT RELATIONS ACT.

Petitioner, the Chamber believes, was tried and convicted under an erroneous construction and application of Section 302 of the LMRA.

A. The Animating Purpose Of Section 302

Section 302 of the LMRA was enacted into law in 1947. The original Section 302 was introduced on the floor of the Senate as a proposed amendment to a bill under consideration.[8] Senator Ball, who introduced the proposed amendment, described its purpose as follows:

> [T]he pending amendment deals with so called welfare funds, which are becoming increasingly

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[8] The legislative history of Section 302 is described fully in *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1050-51, 1053 (2d Cir. 1986).

> prominent in negotiations between unions and employers. . . . The sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them, and that they shall not degenerate into bribes. . . .

2 *Legislative History of the Labor-Management Relations Act of 1947* (1948), pp. 1304-05. *See also Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (observing that Section 302 was enacted because of Congress' concern "with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control."). Moreover, as the Second Circuit has noted, although Section 302 has been amended several times since 1947, in enacting the amendments Congress reaffirmed Section 302's purpose "as the limited one of 'prevent[ing] bribery, extortion, shakedowns, and other corrupt practices. . . . ' [and prohibiting] 'all forms of extortion and bribery in labor-management relations.' " *BASF Wyandotte Corp. v. Local 227*, *supra*, 791 F.2d at 1053, *quoting* H.R. Rep. No. 286, 91st Cong., 1st Sess. 1-2, *and* S. Rep. No. 187, 86th Cong., 1st Sess. 13.

In sum, as the principal legislative purpose underlying Section 302 was to ensure the legitimacy of union welfare funds and to prevent their use as bribes to union officials, it follows that the *per se* construction of Section 302 adopted by the court of appeals – i.e., that a Section 302 violation may be present even in the absence of an

evil intent and even with the elimination of the "reward," or bribe, allegations from the indictment – is inconsistent with that purpose.

B. The Circuit Court's Construction Of Section 302 Does Not Comport With the Underlying Purpose of the Statute.

As we show below, the Circuit Court's restrictive reading of Section 302 is not only erroneous but effectively criminalized a wide range of conduct long considered to be lawful.

1. Although the court below did not refer to the case, its construction of the Section 302(c)(1) exemption is essentially consistent (cf. Pet. pp. 18-19) with the decision of the panel majority in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986). That majority held, in a case involving pension credits to employees on union-related leaves of absence, that the Section 302(c)(1) exemption was applicable "solely to payments made as 'compensation for or by reason of' the . . . *past* services actually rendered by . . . former employees *while they were employees of the company*." *Id.* at 106, 108 (emphasis in original).

Judge Becker's dissent in *Trailways* presents a cogent response to the equally specious construction of Section 302(c)(1) by the court below.[9] Relying on the "by reason of" language in Section 302(c)(1), Judge Becker stated that

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[9] Judge Becker was joined by two other circuit Judges in voting to rehear the *Trailways* case *en banc*. 785 F.2d at 101.

"[c]ontributions made as compensation for services rendered to Trailways simply do not constitute bribery of the Union or any other kind of support of the Union by Trailways," and that "upholding the contributions in this case neither offends the policy of the act nor entails a waiver of strict compliance with the language of § 302." *Id.* at 110.

Judge Becker also found that the cases validating the "no-docking" principle (Section I above) provided "strong support" for the legality of the pension payments. *Id.* He rejected the majority's efforts to distinguish those cases, saying:

> The distinction does not work. . . . During the hours that these persons spent on union activities, they were not rendering services to their employer, and they were not under their employer's control. The distinction between using part of the day for union business and taking leaves of absence to become full-time union officials is only one of degree: the nature of the absences and the payments by the employer during them (or measured by them) is the same.

Id. at 111.

Finally, Judge Becker faulted the majority for not according weight to the widespread nature of the practice involved, finding that the pervasiveness of such practices "provides further reason to believe that the pension contributions at issue here are not illegal and that the dangers the majority alleges are more fictitious than real," and cautioning that the "Court should be reluctant to overturn so widespread a practice, which represents a

practical accommodation agreed upon by both businesses and unions." *Id.*

Prior to 1986, when *Trailways* was decided, the legal authority on the subject had uniformly treated this practice as lawful under Section 302. As early as 1977, the United States Department of Labor had rendered the opinion that Section 302 does not prevent "an employee, who is on leave of absence without pay from a company in order to serve as a union officer, from receiving retirement credit for the period during which he serves as a union official." Opinion Letter dated July 12, 1977, from the DOL's Office of the Solicitor to William N. Wheat and Associates.

Also in 1977, an arbitrator considering the issue held that it was not a violation of Section 302 for an employer to grant "credited service" for pension benefit purposes to an employee who had been on annual leaves of absence for more than 30 years in order to serve as an International Union Representative on a full-time basis. *Monsanto Co.*, 68 Lab. Arb. (BNA) 101, 110, 112-13 (1977).[10] In *Communication Workers of America, AFL-CIO v.*

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[10] In response to the parties' request that he render an opinion on the legality of the practice in question, the arbitrator in *Monsanto* stated:

> In the judgment of the arbitrator, there is no intent manifested in the language of Section 302, to restrict and abolish the almost universal practice of granting leaves of absence to union employees for union business. To so interpret and construe the statute, would be straining the language of Section 302 to an unreasonable, and unwarranted extent. . . .

Bell Atlantic Network Serv., Inc., 670 F. Supp. 416 (D.D.C.), a case decided in 1987, the Court explicitly rejected the reasoning of the *Trailways* majority and its view that Section 302(c)(1)'s "by reason of" language was no broader than the more specific "compensation" language of that provision:

> It is unlikely that Congress intended to be redundant. The fact that the phrase "as compensation for" and "by reason of" are cojoined by the disjunctive "or" usually indicates that the two phrases have different meanings. *See Garcia v. United States*, 469 U.S. 70, 73, 105 S. Ct. 479, 481, 83 L. Ed. 2d 472 (1984) ("canons of construction indicate that terms connection [sic] in the disjunctive . . . be given separate meanings."). Thus, contrary to defendants' urgings, the Court accords independent significance to the meaning of the phrase "or by reason of. . . . "

Id. at 419-20. Accordingly, the court concluded that the union leave benefits at issue did not contravene Section 302's purpose of "prevent[ing] bribery, extortion, shakedown and other corrupt practices." *Id.* at 422-24.

In sum, as the foregoing shows, the restrictive construction of Section 301(c)(1) by the court below is flawed.

> . . . Section 302 of the Taft-Hartley Act, in no manner prohibits, nor was it intended to prohibit the granting of a pension to an employee on approved leave of absence for purpose of serving as a Union International Representative.

68 Lab. Arb. (BNA) at 110, 112.

2. In contrast to Section 302's civil provisions, one of its criminal provisions, Section 302(d)(2), states that "any person who *willfully* violates this Section . . . shall be guilty of a felony." This language, the Chamber submits, refers not to the willful commission of *acts* – here the intentional payment and receipt of pension benefits – but to the willful violation of the *statutory prohibition*, i.e., acting with bad purpose to disobey or disregard the law.

The court of appeals, acting in conflict with the Seventh Circuit's decision in *United States v. Papia*, 910 F.2d 1357 (7th Cir. 1990), determined that the defendants' mere awareness of their actions, as opposed to any evil intent or knowledge of illegality, supplied the requisite *mens rea* under 302(d)(2). The foregoing construction is fallacious for at least three reasons. First, as set forth in Section I, above, the breadth of the Circuit Court's holding reaches a wide range of conduct long considered to be lawful. Accordingly, to permit such conduct to be penalized by felony sanctions absent a showing of an intent to violate the law, or at least a reckless disregard of its duties, runs afoul of this Court's precedent. *See Liparota v. United States*, 471 U.S. 419, 426 (1985). *See also United States v. X-Citement Video, Inc.*, ___ U.S. ___, 1994 WL 662620 (Nov. 29, 1994).

Second, the difficulty that would be encountered in ascertaining whether a benefit payment made by an employer during leave for union service would violate Section 302 mandates against the *per se* criminalization of all such conduct. *See Cheek v. United States*, 498 U.S. 192, 199-200 (1991) (showing of specific intent required where regulatory or statutory context makes "it difficult for the average citizen to know and comprehend the extent of

the duties imposed by the . . . law"); *United States v. Murdock*, 290 U.S. 389 (1933) (same).[11]

Third, it does not necessarily follow from the fact that Congress arguably intended that Section 302 be construed to constitute a *malum prohibitum* offense – as the court of appeals implicitly determined in this case – that the "willfully" provision of § 302(d)(2) should be construed to require only general, rather than specific, intent. *Cf. Morissette v. United States*, 342 U.S. 246, 259-60 (1952). Indeed, it is because many common and innocent practices could run afoul of the statute under a general intent construction that we submit Congress must have intended the willfulness term to require proof of intent to violate, or recklessly disregard, the law.

This Court's reasoning in *Ratzlaf v. United States*, ___ U.S. ___, 114 S.Ct. 655 (1994) – a case involving the statutory prohibition on structuring cash-transactions to avoid federal currency reporting requirements – is

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[11] We note that a criminal violation of Section 302 only arises for a "willful" violation of the Act, whereas no intent requirement is indicated for a civil violation. Such a "two-tiered" liability scheme – with "willful" violations carrying a penalty greater than mere violations – has been interpreted even in the civil context as requiring proof "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute[.]" *Hazen Paper Co. v. Biggens*, ___ U.S. ___, 113 S.Ct. 1701, 1708 (1993) (Age Discrimination in Employment Act), *quoting McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (Fair Labor Standards Act), *and Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 133 (1985) (Title VII of the Civil Rights Act). We submit that the sanctions attending a criminal violation of the law present an even greater reason for requiring proof of actual intent.

instructive in this regard. In *Ratzlaf* as here, the Act imposed criminal penalties upon those who willfully violated the Act. Nonetheless, the Government argued, as the court of appeals reasoned in this case, that no proof of intent to violate the law was required for conviction because the conduct at issue was " 'not the kind of activity that an ordinary person would engage in innocently.' " 114 S.Ct. at 660. After referring to instances in which structuring might occur without unlawful intent, the Court concluded "we are unpersuaded with the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring." *Id.* The Chamber submits that the reasoning of *Ratzlaf* applies equally to the employer practices reached by the holding of the court of appeals in this case.

In sum, the Eleventh Circuit's treatment of the "willful" requirement of Section 302(d)(2) is not only erroneous on a practical level, but also runs afoul of *Ratzlaf's* teaching, and, as Petitioner has shown, it is in conflict with rulings of other circuits.

CONCLUSION

For the foregoing reasons, the Chamber urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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USX CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

THERMON PHILLIPS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 302(a) of the Labor Management Relations Act, 29 U.S.C. 186(a), prohibits an employer from retroactively granting full-time union officials who are former employees indefinite leaves of absence to earn credits toward pension eligibility.

2. Whether Section 302(d)(2), which makes it a felony to violate Section 302(a) "willfully," requires proof that a defendant acted with the specific intent to do something that the law forbids.

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p. 16,367 21
p. 16,378 21
Labor Management Racketeering Act of 1983: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. (1983) 23
S. Rep. No. 83, 98th Cong., 1st Sess. (1983) 21, 22, 23
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 21, 22

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-830

USX CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 94-831

THERMON PHILLIPS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 19 F.3d 1565.[1]

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 94-830.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1994. A petition for rehearing was denied on August 9, 1994. Pet. App. 41a-42a. The petitions for a writ of certiorari were filed on November 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioners Phillips, Rich, and USX Corporation (USX) were convicted of conspiracy to violate the Labor Management Relations Act (LMRA or Act), 29 U.S.C. 186, in violation of 18 U.S.C. 371. In addition, petitioners Rich and Phillips were convicted of receiving illegal benefits from an employer, in violation of 29 U.S.C. 186(b)(1). Petitioner USX was convicted on two counts of paying illegal benefits to employee representatives, in violation of 29 U.S.C. 186(a)(1); ten counts of mail fraud, in violation of 18 U.S.C. 1341; and one count of failure to notify potential beneficiaries of a change in their pension plan, in violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1131. Petitioner USX was fined $4,105,000 and ordered to pay $290,000 in restitution to the United States Steel and Carnegie Pension Fund. Petitioner Rich was sentenced to 36 months' imprisonment, to be followed by three years' supervised release, and fined $6,000. Petitioner Phillips was sentenced to 30 months' imprisonment, to be followed by two years' supervised release, and fined $6,000. C.A. App. Tabs 4-6.

1. Petitioner USX owns and operates steel mills throughout the United States. The steel workers in the

mills are represented by the United Steelworkers of America, International Union (Union), which every three years negotiates a basic collective bargaining agreement with USX that governs the rates of pay, including pension benefits, of the steel workers. The Union is divided into districts. After the basic agreement is reached, the Union's district directors and subdistrict directors negotiate local collective bargaining agreements with USX that govern working conditions at the steel mills within their districts. Pet. App. 2a-3a.

USX's Fairfield Steel Mill (Fairfield) in Birmingham, Alabama, was located in District 36. In 1983, petitioners Phillips and Rich were the district director and subdistrict director, respectively, of District 36. Phillips and Rich were full-time Union employees. Phillips had worked for USX from 1948 to 1951, and Rich had worked for USX from 1949 to 1964. When Phillips and Rich left USX's employment, the basic agreement provided that a worker who left USX to become a Union employee could request a one-year leave of absence. If USX granted the request, the worker would continue to accrue, for pension purposes, continuous service credits for that year. USX could extend the leave of absence for an additional year, but the basic agreement limited such leaves to two consecutive years. To maintain his pension eligibility, a worker who left USX to accept Union employment had to return to USX before his leave of absence expired. Since Phillips and Rich did not return to USX after accepting Union employment, they were not eligible for pensions. Pet. App. 3a-4a.

In September 1983, six months after USX and the Union had reached a basic agreement, Phillips and Rich began negotiating a local collective bargaining agreement on behalf of the ten Union locals at Fairfield with

William Miller, the USX vice president for labor relations. At that time, Fairfield and several other USX steel mills were idle due to depressed market conditions. USX was not willing to resume production at those mills unless the locals agreed to a permanent reduction in the work force, the elimination of incentive pay, and the discontinuation of certain restrictive work practices. Pet. App. 3a. For their part, Phillips and Rich decided to condition any local agreement on USX's willingness to award them and seven other Union employees sufficient retroactive "continuous service" credits to allow them to retire and to receive a pension from USX. *Id.* at 3a, 5a.

The negotiations over the local agreement involved several meetings over the course of four months. At the first meeting, Phillips and Rich told Miller that the Union wanted the basic agreement amended to authorize the granting of unlimited leaves of absence for workers who wished to leave USX to accept Union employment. Miller responded that USX would not agree to such an amendment. At the second meeting, Rich took Miller aside and told him, "[Y]ou accommodate us and we'll accommodate you." Rich then handed Miller a proposal extending the leaves of absence of Phillips, Rich, and the other seven Union employees "for an indefinite period of time until such person dies or takes pension." Miller sent the proposal to J. Bruce Johnston, the USX executive vice president for employee relations, who consulted with David Roderick, the chief executive officer and chairman of the board of USX. Johnston instructed Miller to reject the proposal. Following another meeting in October 1983, Phillips and Rich told Miller that there would be no local agreement with Fairfield until USX authorized the pensions. Miller responded that USX knew of no way to pay the pensions. Pet. App. 3a, 5a-7a.

In the meantime, USX was demanding concessions similar to those demanded of Fairfield in the negotiations of local agreements with other Union district directors. When the Union refused to grant the concessions, all negotiations ceased in mid-November 1983. Miller, however, continued to communicate with Phillips and Rich. At a meeting on December 23, 1983, Miller told Roderick and Johnston that one of the items still "on the table" at Fairfield was the pensions for Phillips, Rich, and the seven other Union employees. Johnston instructed Miller to reopen the negotiations with Phillips and Rich. Pet. App. 7a.

On December 24, 1983, Miller met Phillips and Rich in Birmingham, and they negotiated a local agreement for Fairfield. Phillips and Rich nevertheless refused to sign the agreement because USX had not agreed to authorize the pensions. Miller called Johnston, who instructed Miller to tell Phillips and Rich that USX would consider their request for retroactive leaves of absence on certain conditions. When Miller relayed the conditions, Phillips and Rich asked Miller whether he believed that USX would grant the pensions. Miller answered that USX would favorably consider the matter. Phillips and Rich then signed the local agreement, which called for a reduction in the work force at Fairfield, reductions in the incentive pay of the mill's workers, and the elimination of the work practices disliked by USX. Shortly afterwards, USX resumed steel production at Fairfield and permanently closed several other plants. Pet. App. 7a-9a; Gov't C.A. Br. 23-24.

In July 1984, several workers at Fairfield filed grievances against USX challenging its interpretation of the local agreement. Phillips and Rich, as the local Union officials, were responsible for determining

whether the grievances would be prosecuted and, if they were not resolved, whether to demand arbitration. When Johnston learned of the grievances, he contacted Miller. On Johnston's instructions, Miller told Phillips and Rich that USX would grant their pensions. The grievances were subsequently withdrawn. Pet. App. 9a.

Shortly thereafter, Johnston drafted an amendment to the basic agreement's leave of absence provision. He did not submit it to the Union because he was advised that the Union members at Fairfield might learn of the amendment and conclude that Phillips and Rich had betrayed them. Instead, Johnston decided to have USX's Corporate Policy Committee, on which he and Roderick served, authorize the pensions that Phillips and Rich sought. Pet. App. 9a-10a.

On October 22, 1984, Johnston submitted to the Corporate Policy Committee a two-part proposal that was adopted the same day. First, the proposal amended the USX Personnel Manual to allow the Committee, in its discretion, to grant leaves of absences for periods in excess of two years to workers who left USX's employment to work for the Union. Second, the proposal granted retroactive leaves of absence to former employees who had left USX's employment to work for the Union and who had lost their right to a USX pension because they had exhausted their leaves of absences. Pet. App. 10a-13a.

Johnston also prepared and signed a standard company form that both recommended and authorized pensions for Phillips, Rich, and four of the Union employees on their list.[2] Johnston backdated the form to January 1, 1984,

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[2] In fact, only Rich met the requirements of the second part of the proposal that was approved by the Corporate Policy

and indicated that the pensions would be effective March 1, 1984. When the form arrived at the employee benefits office at Fairfield, the benefits office questioned its propriety because it had not been prepared in accordance with USX's standard procedure. After the office supervisor called his superior at USX headquarters, he instructed the benefits office to "keep the matter quiet." Although the form prepared by Johnston was not entered into the record system, the employee benefits office at Fairfield certified to the United States Steel and Carnegie Pension Fund, Inc. (the Administrator), that Phillips, Rich, and the other four Union employees were eligible for pensions. Pet. App. 13a-14a.

Shortly thereafter, Rich and the other four Union employees signed pension applications indicating that they had retired from USX effective March 1, 1984. One of the Union employees also signed a pension application on behalf of Phillips, who was in Florida at the time. The Administrator finished processing the applications on November 19, 1984, and began mailing pension checks on December 1, 1984. Phillips received a total of $55,319, and Rich received $48,318. Although receiving the pensions violated the Union's rules, Phillips, Rich, and the other four Union employees continued to work for the Union. Pet. App. 14a-15a.

Committee. Phillips did not satisfy the requirements because he had left USX to work for another union, and the other four Union employees did not qualify because they had not continuously served bargaining units at the USX division where they had been employed. Pet. App. 15a. Moreover, although more than 50 other Union employees became eligible for pensions under the second part of Johnston's proposal, neither Johnston nor anyone else at USX made any effort to identify the potential pensioners or to include their names on the authorization form. *Id.* at 12a, 14a n.11.

Under an earlier contract, USX had undertaken some of the duties imposed on the Administrator by ERISA, including the duty to notify the Department of Labor and the participants in the pension plan of any material changes to the plan. See 29 U.S.C. 1021(a)(1), 1022(a)(1), 1024(a)(1)(D). The Corporate Policy Committee's adoption of Johnston's proposal constituted a material change in the pension plan because the second part of the proposal created a new class of beneficiaries. USX did not notify the Department of Labor or the pension plan's participants of the new class of beneficiaries created by the adoption of Johnston's proposal. Pet. App. 15a-16a.

2. The grand jury charged that the retroactive leaves of absence granted to Phillips and Rich violated 29 U.S.C. 186(a)(1), which prohibits any employer from giving anything of value "to any representative of any of his employees who are employed in an industry affecting commerce." Petitioners argued that the leaves of absence did not violate the LMRA because they fell within an exception provided in 29 U.S.C. 186(c)(1), which exempts from the Act's prohibition benefits given by an employer to a union official "who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer."[3] Over petitioners' objections, the district

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[3] Section 302 of the Labor Management Relations Act, 29 U.S.C. 186, provides in pertinent part:

> **(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations**
>
> It shall be unlawful for any employer * * * to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

court instructed the jury that the exception in 29 U.S.C. 186(c)(1) applies "only to payments by an employer to former employees for past services actually rendered by those former employees while they were employees of the employer company." Pet. App. 19a.

The district court also rejected petitioners' argument that 29 U.S.C. 186(d)(2), which provides that any person who "willfully violates" 29 U.S.C. 186 is guilty of a criminal offense, required the government to prove that they acted with the specific intent to violate the law.[4] Over petitioners' objections, the court instructed the jury that "the Government is not required to prove that

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(1) to any representative of any of his employees who are employed in an industry affecting commerce[.]

* * * * *

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * * *

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer * * * to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer[.]

[4] 29 U.S.C. 186(d)(2) provides in part that, "[e]xcept for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony."

the pension payments were made by or for USX Corporation or received by the individual defendants with an evil or bad purpose or with intent to violate the law or with knowledge that the law would be or was violated." 94-831 Pet. App. 41a. In addition, the court charged the jury as follows:

> The word ["]wilfully["] means that the person or entity charged as a defendant knowingly and intentionally committed acts which constitute the offense charged and that such acts were not committed accidentally or by some mistake. For example, if USX Corporation caused a pension check to be sent to one of the individual defendants by accident or mistake, such as [a] computer error, such USX Corporation act would not be intentional and thus would not be wilful. On the other hand, if USX Corporation intended for such a pension check to be sent and knowingly caused it to be sent, then that act would be wilful.

Id. at 42a.

3. The court of appeals affirmed. Pet. App. 1a-40a. It ruled that the district court correctly instructed the jury on the scope of the exception provided in 29 U.S.C. 186(c)(1). Pet. App. 18a-23a. The court rejected petitioners' claim that payments given "by reason of" service as a former employee need not be for past services actually rendered by former employees while they were employees to fall within Section 186(c)(1)'s exception. "Because section 186(c)(1) only excepts payments given 'as compensation for' or 'by reason of' an employee's 'service as an employee,'" the court reasoned that "a payment given to a *former* employee must be for

services he rendered *while he was an employee* to qualify for the exception." Pet. App. 21a.

The court of appeals also rejected petitioners' claim that the government was required to prove that they acted with the specific intent to violate 29 U.S.C. 186. Instead, the court held that the term "willfully," as used in 29 U.S.C. 186(d), requires proof only of general intent. Pet. App. 23a-37a. The court pointed out that, "in some contexts, courts have interpreted 'willfully' as requiring a finding of general intent, meaning the intent to engage in the prohibited conduct; that is, acting voluntarily, knowingly, and intentionally, and not accidentally or mistakenly." *Id.* at 24a. The court relied principally on the statutory framework of Section 186, and especially Section 186(d)(1), which indicates that, when Congress required proof of specific intent, it did not rely solely on the word "willfully" but employed additional language to impose that requirement.[5] See Pet. App. 29a-34a.

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[5] 29 U.S.C. 186(d)(1) provides in part:

> Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, *and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9)* violates this subsection, shall, upon conviction thereof, be guilty of a felony * * * ; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed

The court also noted that four courts of appeals had construed Section 186(d) to require only general intent before Congress amended Section 186(d) in 1984 to create separate subsections (d)(1) and (d)(2). The amendment retained the term "willfully" in both subsections but established a specific intent requirement for prosecutions under subsection (d)(1). Pet. App. 34a-35a & n.27. "Because Congress left the willfulness requirement of former section 186(d) unchanged when it created section 186(d)(2) in 1984," the court "assume[d] that Congress intended 'willfully' to require a finding of only general intent." Pet. App. 34a-35a.[6]

ARGUMENT

1. Petitioner USX contends (Pet. 8-14) that the retroactive credits and pensions that it gave to Phillips and Rich did not violate 29 U.S.C. 186(a), because those payments were sheltered under 29 U.S.C. 186(c)(1) as payments given "by reason of" the former employees' "service as an employee." That contention does not warrant this Court's review.

Section 186 "is, in part, a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement." Pet. App. 18a. "It is fairly universally acknowledged that a central purpose of [Section 186] as a whole [is] to prevent employers from bribing union officials." *Toth* v. *USX Corp.*, 883 F.2d 1297, 1300 (7th Cir.), cert. denied, 493 U.S. 994 (1989); see

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$1,000, such person shall be guilty of a misdemeanor[.] [Emphasis added.]

[6] The court of appeals likewise rejected USX's argument that the district court erroneously instructed the jury that proof of only general intent was required to establish that USX "willfully" violated ERISA, 29 U.S.C. 1131. Pet. App. 37a-40a.

also *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959). Section 186(a) thus prohibits employers from paying anything of value to employees' representatives or union officials, and Section 186(b), in turn, prohibits those representatives and officials from receiving such payments.

The narrow exception provided in Section 186(c)(1) states that Sections 186(a) and (b) are not applicable "in respect to any money or other thing of value payable by an employer * * * to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." Because Section 186(c)(1) excepts only payments given "as compensation for" or "by reason of" an employee's "service as an employee,"[7] the court of appeals correctly held that the retroactive payments given to Phillips and Rich were not covered by the exception, for those payments had no relation to any "service" that they rendered when they were USX employees. See Pet. App. 21a-22a.

Contrary to petitioner USX's argument (Pet. 9-13), the court of appeals' decision in this case does not conflict with the decision of any other court of appeals. In *Trailways Lines* v. *Trailways, Inc. Joint Council of Amalgamated Transit Union*, 785 F.2d 101, cert. denied, 479 U.S. 932 (1986), the Third Circuit ruled that a provision in a collective bargaining agreement granting employees leaves of absence to work for a union while accumulating pension credits with the company did not

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[7] Petitioners conceded in the court of appeals that the pension payments in this case were not given "as compensation for" the past service of Phillips and Rich as USX employees. Pet. App. 19a-20a.

fall within the Section 186(c)(1) exception. 785 F.2d at 104-108. In rejecting the claim that the arrangement qualified for the exception because it was offered "by reason of" the former employees' service to Trailways, the Third Circuit found that "[a] logical reading of the statute makes clear that [Section 186(c)(1)] applies solely to payments made as 'compensation [for] or by reason of' the former employees' *past* service to the employer." *Id.* at 106. The Third Circuit concluded that Section 186(c)(1) "contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company.*" *Ibid.*

In *Toth* v. *USX Corporation*, 883 F.2d 1297, cert. denied, 493 U.S. 994 (1989), the Seventh Circuit considered the leave of absence policy at issue in this case, in the context of a civil action brought by union representatives who were former USX employees and were denied benefits when USX rescinded the policy. The court held that the policy violated Section 186. 883 F.2d at 1300-1306.[8] As petitioner USX points out (Pet. 11), the Seventh Circuit in *Toth* questioned part of the Third Circuit's reading of the language of Section 186(c)(1) in *Trailways*. In particular, the Seventh Circuit suggested that an employer might permissibly make payments under Section 186(c)(1) to former employees, as well as current employees, "as long as the payments are in some way motivated by past service." 883 F.2d at 1304. The Seventh Circuit reasoned that continuing payments to former employees might

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[8] In *Toth*, petitioner USX argued, contrary to its position in this case, that the leave of absence policy violated Section 186. See 883 F.2d at 1300.

constitute permissible payments "by reason of" past service when those continuing payments were embodied in a collective bargaining agreement, as, for example, when an employee leaves the employer's service temporarily but continues to accrue benefits provided for in the agreement. See *id.* at 1304-1305. The Seventh Circuit stressed, however, that "collective bargaining and inclusion [of the payments] in a generally disseminated collective bargaining agreement, whose terms are uniformly applicable and nondiscriminatory, [would be] crucial." *Id.* at 1304. The Seventh Circuit ultimately concluded that USX's policy could not qualify as "compensation for or by reason of" former employment because, unlike the policy in *Trailways*, USX's leave policy was not a part of a bargained-for labor agreement. *Ibid.*

In light of the decisions in *Trailways* and *Toth*, it is clear that the outcome of this case would not have been different in either the Third Circuit or the Seventh Circuit. Under the Seventh Circuit's reading of Section 186(c)(1), the payments in this case were illegal because they were not "part of the bargained-for collective bargaining agreement" that set the terms of compensation for all the employees in the bargaining unit. *Toth*, 883 F.2d at 1305. The Third Circuit's reading of the exception in Section 186(c)(1) is even narrower than the Seventh Circuit's construction; the Third Circuit would hold that the payments in this case were illegal because they were not directly attributable to past services actually rendered by Phillips and Rich while they were employees of USX. See *Trailways*, 785 F.2d at 106.

While the Third Circuit does not appear to share the Seventh Circuit's view that the exception in Section

186(c)(1) may cover pension credits accumulated by union officials during leaves of absence from their former employer that accrued pursuant to provisions of a collective bargaining agreement, the question whether Section 186(c)(1) covers such credits is not presented in this case. Phillips and Rich were not granted their retroactive leaves of absence to earn pension credits pursuant to a collective bargaining agreement; rather, they obtained the credits under a private arrangement with USX, which USX sought to conceal from the union membership to avoid the perception that Phillips and Rich had betrayed union members. Pet. App. 9a-10a. Likewise, petitioners are not helped by cases involving fringe benefits offered, pursuant to a collective bargaining agreement, to employees on temporary leaves of absence from an employer as well as current employees,[9] or cases in which employers, under such agreements, allow currently employed union officials time off with pay for the purpose of conducting union-related business.[10] No court of appeals that has addressed the scope of Section 186(c)(1) would have found

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[9] The district court case cited by petitioner USX (Pet. 11) therefore does not support its interpretation of Section 186(c)(1). In *Communications Workers of America* v. *Bell Atlantic Network Services, Inc.*, 670 F. Supp. 416, 419-423 (D.D.C. 1987), the court held only that provisions in collective bargaining agreements permitting employees to take unpaid leaves of absence for union business without losing fringe benefits fell within the exception provided in Section 186(c)(1). In reaching that conclusion, the court reasoned that the terms of employment for which unions bargain (including the possibility of unpaid leave) should be considered part of the compensation for which employees work. 670 F. Supp. at 419-420; accord *Toth*, 883 F.2d at 1304.

[10] See *BASF Wyandotte Corp.* v. *Local 227, International Chemical Workers Union*, 791 F.2d 1046, 1048-1051 (2d Cir. 1986).

the payments in this case to be lawful, and this case does not implicate any broad-ranging policy issues regarding the scope of the Section 186(c)(1) exemption.[11]

2. Petitioners contend (94-830 Pet. 14-19; 94-831 Pet. 9-24) that the government was required to prove that they acted with specific intent to violate the law to establish that they "willfully" violated 29 U.S.C. 186. That contention also does not warrant this Court's review.

a. Contrary to the individual petitioners' contention (Pet. 12-15), this Court did not hold, in *Ratzlaf* v. *United*

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[11] Petitioners Phillips and Rich rely (Pet. 7) on a 1977 letter from the Department of Labor as support for their assertion that the continued accrual of pension credits while an employee is on a leave of absence and working as a union official was thought to be permissible. That letter, however, specifically disclaimed any authority on the part of the Labor Department to "provide a definitive opinion as to whether a violation would occur in connection with the situation described," and it addressed the issue only "[i]n the abstract." Moreover, the letter concerned an employee who was "on a leave of absence without pay from a company to serve as a union officer," not (as in this case) former employees who sought to be placed on unpaid leave retroactively. Moreover, in a 1979 letter, the Department of Labor concluded that a "former employee" who was "on leave" from the employer and working for a union could not be "placed back" in the employer's pension plan, because of the strictures of Section 186. The Department expressed the view that "the payment by a company into a pension plan for an employee of the labor organization * * * who renders no service to the company" would violate Section 186. That situation more closely resembles this case.

Likewise, the 1980 Department of Labor report relied on by USX (Pet. 9), which surveyed unpaid leave arrangements embodied in collective bargaining agreements, has no relevance to this case, which does not involve any provision of a collective bargaining agreement.

States, 114 S. Ct. 655 (1994), that the use of the term "willfully violates" in every criminal statute requires proof of specific intent.[12] In *Ratzlaf*, the Court construed the term "willfully" in 31 U.S.C. 5322(a), the criminal enforcement provision for the prohibition in 31 U.S.C. 5324 against structuring currency transactions for the purpose of evading a financial institution's reporting requirement. Although the Court held that Section 5322(a) required proof that the defendant acted with knowledge that the structuring in which he engaged was unlawful, 114 S. Ct. at 663, the Court emphasized that "willfully" is "a 'word of many meanings,' and 'its construction [is] often * * * influenced by its context.'" *Id.* at 659 (quoting *Spies* v. *United States*, 317 U.S. 492, 497 (1943)); see also *Screws* v. *United States*, 325 U.S. 91, 101 (1945) (plurality opinion); *United States* v. *Murdock*, 290 U.S. 389, 395 (1933).

"[I]n many contexts, * * * 'willfully' refers to consciousness of the act but not consciousness that the act is unlawful." *Cheek* v. *United States*, 498 U.S. 192, 209 (1991) (Scalia, J., concurring in the judgment). In this case, the court of appeals correctly held that "willfully," as used in 29 U.S.C. 186(d), requires proof only of general intent. The criminal enforcement provision of Section 186 is set forth in subsection (d). Before subsection (d) was amended in 1984, it provided that "[a]ny person who willfully violates any of the provisions of * * * section [186] shall * * * be guilty of a misdemeanor." 29 U.S.C. 186(d) (1982). When Congress amended subsection (d) in

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[12] Indeed, neither the individual petitioners nor USX takes issue with that portion of the court of appeals' opinion (Pet. App. 37a-40a) holding that ERISA's criminal enforcement provision, 29 U.S.C. 1131, which employs the phrase "willfully violates," requires only proof of general intent.

1984 to make some violations of Section 186 felonies, it also divided subsection (d) into two parts. Subsection (d)(1) applies to payments that are illegal because they do not satisfy certain technical requirements of subsections (c)(4)-(9). For those violations, 29 U.S.C. 186(d)(1) requires proof that the person participating in the payment acted "willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment." Subsection (d)(2) applies to all other illegal payments that are not covered by subsection (d)(1), *i.e.*, payments prohibited by subsections (a) and (b) for which Congress did not provide any exception in subsection (c). For those violations, subsection (d)(2) requires proof only that the parties participating in the payment "willfully violate[d] this section."

In light of that statutory structure, the court of appeals correctly found that "Congress had to have intended the term 'willfully' as used in both sections 186(d)(1) and (d)(2) to require a finding of general intent; otherwise the [additional] 'intent to benefit' language in section 186(d)(1) would be superfluous, because a person who had the specific intent to violate [Section 186] would also necessarily intend to benefit himself or to influence a union official." Pet. App. 31a-32a. As the court explained, under petitioners' interpretation, the additional intent requirement of Section 186(d)(1) would serve little or no purpose, for it would exclude from the reach of criminal liability only those "payments made with the specific intent to violate the law, but without the intent to benefit himself or influence the recipient." *Id* at 32a.[13]

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[13] Petitioners Phillips and Rich assert (Pet. 19-20) that the court of appeals' reasoning is "specious" because an employer and

In addition, as the court of appeals explained (Pet. App. 32a-33a), other aspects of the statutory scheme confirm that the term "willfully" requires proof only of general intent. The criminal enforcement provision applicable to Section 186 prohibits payments if the employer acts "willfully," yet Sections 186(a)(3) and 186(a)(4) bar payments by an employer only if the employer also acts with an "intent to influence" the recipient. Given that the "intent to influence" language applies only to subections (a)(3) and (a)(4), the court of appeals concluded that "Congress must have intended sections 186(a)(1)-(2) to prohibit payments to representatives even if they were made without any intent to influence." Pet. App. 33a. But it would be "nonsensical" to suppose that Congress intended to create a criminal prohibition that applied to "payments made to employee representatives without any intent to influence but with specific intent

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union may knowingly violate the technical requirements of subsections (c)(4)-(9) without having any intent to confer an improper benefit on anyone. But, as the court of appeals observed (Pet. App. 32a), it is doubtful that such a "scenario could actually occur, let alone [that] Congress intended such an absurd statutory scheme." In the absence of an intent to obtain or confer an improper benefit, there appears to be no reason for anyone who knows about the technical requirements of subsections (c)(4)-(9) to disregard them, and petitioners offer none. Moreover, it is highly unlikely that Congress added the intent-to-benefit requirement to subsection (d)(1) to protect from criminal prosecution those persons who knowingly disobeyed the law, but who did not intend to reap any personal benefit. Rather, Congress sought, in subsection (d)(1), to exempt from criminal prosecution those persons who committed acts that contravened subsections (c)(4)-(9), but who did not intend to benefit someone prohibited by the statute from receiving things of value and did not know that the intended beneficiary was prohibited from receiving things of value, *i.e.*, persons acting only with general intent.

to violate the law." *Ibid.* In sum, "[t]he double enforcement provision in section 186(d) and the dual structure of prohibited payments in section 186(a) suggest that Congress intended the term 'willfully' to require proof only that the payment was made knowingly and intentionally, not accidentally or by some mistake." *Id.* at 34a.

b. The court of appeals also noted that, "[w]hen Congress amended Section 186(d) in 1984, it made no attempt to change the clear majority rule [in the courts of appeals] that 'willfully' required a finding of only general intent." Pet. App. 34a. "Because Congress left the willfulness requirement of former section 186(d) unchanged when it created section 186(d)(2)," the court "assume[d] that Congress intended 'willfully' to require a finding of only general intent." *Id.* at 34a-35a. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

The court of appeals' analysis is supported by the legislative history of the 1984 amendments to Section 186. The amendments were enacted as part of Chapter VIII of the Comprehensive Crime Control Act of 1984, and were identical to amendments contained in a labor-racketeering bill passed by the Senate in 1983.[14] The Senate committee reports accompanying the 1984 Act and the 1983 bill indicate that Congress included the "intent to benefit" language in Section 186(d)(1) precisely because it was concerned that "willfully" carried the connotation of general intent, and that a

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[14] See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 801, 98 Stat. 2131; S. Rep. No. 225, 98th Cong., 1st Sess. 297 & n.1 (1983); cf. 129 Cong. Rec. 16,367, 16,378 (1983); S. Rep. No. 83, 98th Cong., 1st Sess. 2 (1983).

person could be prosecuted for a willful violation of the law even if he believed his actions were lawful. The 1984 committee report states, for example:

> Title VIII grants special treatment to transactions addressed by [29 U.S.C. 186(c)(4) through (9)]. These subsections contain exceptions, often technical in nature, to the prohibitions contained in [29 U.S.C. 186(a) and (b)]. *Because a person can violate a prohibition of [29 U.S.C. 186(a) and (b)] even though he proceeded in the belief that his conduct fell within the excepted behavior of [29 U.S.C. 186(c)(4) through (9)]*, title VIII adds to the "willful" requirements for this behavior the additional element that such conduct be "with intent to benefit himself or to benefit other persons whom he knows are not permitted to receive such payment, loan, money or other thing of value under subsection (c)(4) through (c)(9)."

S. Rep. No. 225, 98th Cong., 1st Sess. 298 (1983) (emphasis added).

The 1983 Senate report also expressed the concern that, without the "intent to benefit" language, one could violate Section 186 "simply because of a failure to satisfy one of the technical requirements for an exemption stated in subsections (c)(4) through (c)(9)." S. Rep. No. 83, 98th Cong., 1st Sess. 12-13 (1983). The 1983 bill did not, however, add any additional element to Section 186(d)(2) for violations of Sections 186(c)(1) through 186(c)(3). To the contrary, the committee noted that the transactions proscribed by subsections (c)(1)-(3) "are not likely to be innocently motivated. Rather, the very fact of the payment generally shows the attributes of self-dealing and abuse of position that justify the criminal

penalty." S. Rep. No. 83, *supra*, at 13. Therefore, the committee determined "not to include a specific intent requirement for prosecutions under subsection (d)(2). The mens rea requirement for prosecutions under subsection (d)(2) will continue to be 'willfully.'" *Ibid.*[15]

c. The court of appeals' conclusion that "willfully," as used in 29 U.S.C. 186(d)(2), does not require proof of specific intent to violate the law is consistent with decisions of the Second, Third, Sixth, and Ninth Circuits, all of which held, before Section 186(d) was amended in 1984, that its use of "willfully" required only proof of general intent. See *United States* v. *Cody*, 722 F.2d 1052, 1059 (2d Cir.), cert. denied, 467 U.S. 1226 (1984); *United States* v. *Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982); *United States* v. *Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States* v. *Overton*, 470 F.2d 761, 767 (2d Cir. 1972), cert. denied, 411 U.S. 909 (1973); *United States* v. *Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972); *United*

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[15] Petitioners Phillips and Rich state (Pet. 20 n.11) that the Department of Justice assured the Senate in 1983 that "willfully" connotes a specific intent to disobey the law. The letter relied on by petitioners, from Assistant Attorney General Robert McConnell to Senator Orrin Hatch, concerned the definition of "willfully" in a different provision, 29 U.S.C. 504. See *Labor Management Racketeering Act of 1983: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 98th Cong., 1st Sess. 150 (1983) (*1983 Hearing*). More pertinently, at a hearing on the 1983 Senate bill, Assistant Attorney General Lowell Jensen submitted for the record a statement that observed that, under the proposed amendments to Section 186, illegal employer payments to union officials (like the ones at issue in this case, but unlike the ones covered by subsections (c)(4)-(9)) "which are not transmitted through and used by unions, benefits plans, and cooperation committees * * * will continue to be prosecuted under Section 186 without proof of evil intent or bad motive as under current law." *1983 Hearing*, *supra*, at 104.

States v. *Ricciardi*, 357 F.2d 91, 100 (2d Cir.), cert. denied, 384 U.S. 942 (1966); *United States* v. *Carter*, 311 F.2d 934, 943 (6th Cir.), cert. denied, 373 U.S. 915 (1963).[16]

The Seventh Circuit does appear to have taken a different approach, although, as the individual petitioners appear to acknowledge (Pet. 23-24), that court's decisions are not fully consistent with one another. In *United States* v. *Inciso*, 292 F.2d 374, 380 (7th Cir.), cert. denied, 368 U.S. 920 (1961), the court held that Section 186(d) "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section." Subsequently, in *United States* v. *Keegan*, 331 F.2d 257, 262 (7th Cir.), cert. denied, 379 U.S. 828 (1964), the court held that, because the element of willfulness is satisfied by a showing of recklessness, Section 186(d) does not require proof of a specific intent

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[16] The decision below does not conflict with the Tenth Circuit's decision in *Korholz* v. *United States*, 269 F.2d 897 (1959), cert. denied, 361 U.S. 929 (1960). In that case, the Tenth Circuit upheld against a defendant's challenge a jury instruction that a person must be "either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law or not." 269 F.2d at 903. As the court of appeals noted (Pet. App. 34a-35a n.27), the Tenth Circuit's discussion of Section 186(d) in *Korholz* is "too cryptic * * * to draw a conclusion about whether a general intent instruction would have been upheld." Moreover, the Tenth Circuit also rejected the defendants' contention that the district court should have required the jury to acquit "unless they found that the payments were made with a bad purpose or motive and without justifiable excuse," 269 F.2d at 903, relying on this Court's statement in *United States* v. *Murdock*, 290 U.S. 389, 394 (1933), that "willfully" often denotes "that which is 'intentional, or knowing, or voluntary,' as distinguished from accidental.'"

to disobey the law, but only proof that a reasonable person "would be aware that [the] conduct would likely be illegal." The court of appeals noted in this case (Pet. App. 34a-35a n.27) that such a jury instruction is "the practical equivalent of a general intent jury instruction."

More recently, in *United States* v. *Papia*, 910 F.2d 1357, 1362 (1990), the Seventh Circuit appeared to reaffirm its holding in *Inciso* that Section 186(d) requires "an awareness of or reckless disregard for § 186(d)'s restrictions." In *Papia*, however, the court upheld the trial court's jury instruction that "[a]n act is done 'willfully' if done voluntarily and intentionally with the intent to do something the law forbids; that is to say, with a purpose either to disobey or disregard the law," against the defendant's contention that the trial court should have required the government to show that she acted with an intent to benefit herself or another. *Ibid.* (emphasis omitted). Because the court concluded that the jury was given a specific intent instruction similar to the one requested by the defendant, it did not need to decide whether Section 186(d)(2) required such an instruction. Thus, as the court of appeals noted (Pet. App. 28a n.23), the Seventh Circuit's decision in *Papia* does not address the question presented in this case.

Papia is the only appellate decision other than the decision below to consider the meaning of "willfully" in 29 U.S.C. 186(d) since it was amended in 1984. Moreover, the *Papia* court's consideration of the significance of the post-amendment statutory structure of Section 186(d) for the definition of "willfully" was limited, because one count at issue in *Papia* concerned conduct predating the 1984 amendment, and the other two counts concerned post-amendment conduct for which the government was

required to show that the defendant acted with an intent to benefit herself or another. See 910 F.2d at 1363. Unlike the court of appeals in this case, the court in *Papia* did not consider whether an interpretation of "willfully" to require specific intent would render other parts of the statute superfluous, nor did it consider the legislative history of the 1984 amendments to Section 186(d). If the issue returns to the Seventh Circuit, that court will now have the benefit of the extensive statutory analysis of the Eleventh Circuit, which is the only court of appeals to have examined the post-amendment structure of Section 186(d) in depth. Moreover, since the definition of "willfully" has been litigated in the courts of appeals only twice since 1984, there does not appear to be any pressing need for the Court to decide the issue now. Accordingly, review by this Court is not warranted at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

USX CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

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1. The weakness of the position of the United States in this case is nowhere better illustrated than in its recitation of the events giving rise to this prosecution. There, the United States, like the court of appeals, emphasizes certain testimony that, if credited by the jury, would have supported an inference that the leaves of absence at issue were provided by USX to Rich and Phillips as a *quid pro quo* for their cooperation in approving and implementing the Fairfield Agreement. See United States Br. 3-7; App. 2a-16a. That inference was, of course, hotly contested by the defendants at trial.

More importantly, however, the district court permitted the government to delete any reference to a *quid pro quo* from the LMRA counts in the indictment and to tell the jury to convict the defendants on those counts regardless of USX's purpose in granting, and Rich's and Phillips's

purpose in accepting, the leaves of absence at issue.[1] This theory, when coupled with the district court's instruction that defendants could be convicted of violating the LMRA regardless of their belief as to the legality of their actions, allowed the prosecution to argue in closing that convictions on Counts Two through Five were appropriate so long as "the defendants were awake . . . [and] it wasn't computer error." R41-9576.

Having expressly chosen to prosecute these defendants under a theory bordering on strict criminal liability, the United States should not be permitted to defeat this petition with a one-sided rendition of "facts" irrelevant under that theory.

2. The United States concedes that there is a conflict between the two courts of appeals that have considered the meaning of the term "willfully" in section 302(d)(2) since that provision was amended in 1984. See United States Br. 25-26. The court of appeals also acknowledged this conflict. See App. 27a, 34a.[2] In opposing certiorari on this issue, the United States simply restates the argu-

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[1] As was pointed out in USX's Petition, the LMRA counts in the original indictment as returned by the grand jury specifically charged that the leaves of absence were granted to Rich and Phillips "for having approved the December 24, 1983, Fairfield Works Agreement and for being cooperative in its implementation and interpretation . . . ." R1-1-13-16; Pet. 5. At trial, the United States successfully moved to delete this specification of a *quid pro quo* from Counts Two through Five as surplusage. R35-6551-54.

[2] In defining the supposed "majority" and "minority" camps on this issue, the court below counted itself as joining several other circuits whose decisions predated the 1984 amendment. App. 27a, 34a. Notably, neither the opinion below nor the Brief for the United States adopts or even defends the reasoning of those pre-amendment cases, which were bottomed on a patently erroneous reading of certain dicta in *United States* v. *Ryan*, 350 U.S. 299, 305 (1956). *See, e.g., United States* v. *Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972); *United States* v. *Ricciardi*, 357 F.2d 91, 100 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966).

ments offered by the court below in support of its chosen interpretation.

Those arguments—that the structure and legislative history of section 302(d) lead to the conclusion that the term "willfully" requires nothing more than general intent —were adequately rebutted in USX's Petition, as well as in the Petition filed by Rich and Phillips at No. 94-831. At this juncture, however, it bears noting that the Seventh Circuit, in *United States* v. *Papia*, 910 F.2d 1357 (7th Cir. 1990), also studied the structure and legislative history of that provision and reached exactly the opposite conclusion. See *id.* at 1362-63.[3]

3. In arguing that this Court should not clarify the legality of leaves of absence under section 302 of the LMRA, the United States concedes that the Third Circuit and the Seventh Circuit have disagreed as to what, if any, attributes of such leaves of absence might qualify them for the exception set forth in section 302(c)(1). See United States Br. 13-17. *Compare Trailways Lines, Inc.* v. *Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir.) (holding that any benefits earned after a former employee leaves to work for the union are illegal), *cert. denied*, 479 U.S. 932 (1986), *with Toth* v. *USX Corp.*, 883 F.2d 1297 (7th Cir.) (specifying that leaves of absence would be legal if provided pursuant to a collective bargaining agreement), *cert. denied*, 493 U.S. 994 (1989). The United States neglects to mention, however, that the court of

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[3] Puzzlingly, the United States contends that *Papia* "did not consider whether an interpretation of 'willfully' to require specific intent would render other parts of the statute superfluous, nor did it consider the legislative history of the 1984 amendments . . . ." United States Br. 26. A reading of *Papia* itself refutes that assertion. *See United States* v. *Papia*, 910 F.2d 1357, 1363 (7th Cir. 1990) ("[c]omparing § 186(d)'s structure before and after the amendment scotches any notion that Congress was not adding a new intent element") ("[t]he legislative history fortifies this conclusion").

appeals in *this* case rejected the approaches of both the Third Circuit and the Seventh Circuit and fashioned yet another test of legality under section 302(c)(1), a test focusing on whether the leaves of absence are conferred retroactively. See App. 22a.

Despite this disarray in the lower courts over the meaning of the (c)(1) exception, the United States argues that certiorari is inappropriate because "[n]o court of appeals that has addressed the scope of [the exception] would have found the payments in this case to be lawful, and this case does not implicate any broad-ranging policy issues regarding the scope of [the exception]." United States Br. 16-17. The first argument offered by the United States, while perhaps literally true, is misleading; the second argument is simply wrong.

Even if the leaves of absence at issue here would now be proscribed under *Trailways* because they conferred benefits to union officials, under *Toth* because they were not embodied in a collective bargaining agreement, and under the decision below because they were granted retroactively,[4] none of these various tests had been announced at the time USX was deciding whether to change its leave-of-absence policy. On the contrary, all indications at that time were that section 302(c)(1) meant exactly what it said—that USX could extend a leave of absence for a "former employee" who had become a union official as

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[4] *But see Communications Workers* v. *Bell Atlantic Network Servs., Inc.*, 670 F. Supp. 416 (D.D.C. 1987) (upholding the legality of leaves of absence similar to those found illegal in *Trailways*). According to the United States, the leaves of absence granted by USX would not be legal under the test formulated in *Bell Atlantic* because they were not "terms of employment for which [the union] bargain[ed]." United States Br. 16 n.9. On the contrary, the evidence at trial demonstrated that, prior to revising its policy, USX believed it was responding to a proposal by the United Steelworkers of America regarding eligibility for extended leaves of absence, an issue of great importance to the union. R5-1682-84; R5-1693-1701.

long as that extension was provided "by reason of[] his service as an employee" of USX. Nowhere in that statute was (or is) there any notice that such benefits must be embodied in a collective bargaining agreement or that they cannot be conferred retroactively. Indeed, the government's decision to delete the *quid pro quo* element from the LMRA counts to avoid having to prove specific intent reveals plainly its concern that this confused state of the law would undercut its effort to prosecute petitioners.

When the courts in *Trailways* and *Toth* later read the (c)(1) exception more narrowly, they did so not because of any clear textual command but rather to effectuate—in civil litigation—what they perceived as the policies underlying the LMRA. See 785 F.2d at 107-08; 883 F.2d at 1303-06. Similarly the court below, and the United States in its Brief, look primarily to these perceived policies to justify the rule announced in this case. See App. 20a-22a; United States Br. 15-17. In a criminal prosecution, however, federal courts may not redefine the charged offense to suit some perceived policy, no matter how salutary. The Constitution demands that such decisions be left to Congress and that statutory ambiguities be strictly construed in favor of the defendants. See *Hughey* v. *United States*, 495 U.S. 411, 422 (1990). Neither the United States nor the court below even acknowledged, let alone followed, these fundamental maxims.

* * * * *

In the end, the United States is left to argue that, despite the split in the circuits, despite the impending threat to the liberty of two individuals and the stigma of a criminal conviction to a corporation, and despite the serious, nationwide concern of both management and labor over the confused state of the law,[5] "there does not appear to be any pressing need for the Court to decide the issue

[5] *See, e.g.*, Br. *Amicus Curiae* of the Chamber of Commerce of the United States in Supp. of the Pet'r 2-3, 5-10.

now." United States Br. 26. Only an observer whose interest in labor relations is purely academic, or whose concern is limited to the civil consequences of a potential transgression, could come to such a conclusion. In a criminal prosecution involving real people and a real company, delay risks grave injustice. For the sake of the two individuals whose liberty is presently in jeopardy and the sake of those who must conduct business in the face of mixed signals as to their own potential criminal liability, the Court should resolve this issue now.

CONCLUSION

The petition for writ of certiorari should be granted.

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